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# Stare Decisis Is Cognitive Error

*Goutam U. Jois*<sup>†</sup>

[A]fter [courts] have proceeded a while they get their own set of precedents, and precedents save “the intolerable labor of thought,” and they fall into grooves, just as judges do. When they get into grooves, then God save you to get them out of the grooves.

—Learned Hand<sup>1</sup>

## I. INTRODUCTION

For hundreds of years, the practice of stare decisis—a court’s adherence to prior decisions in similar cases—has guided the common law. However, recent behavioral evidence suggests that stare decisis, far from enacting society’s “true preferences” with regard to law and policy, may reflect, and exacerbate, our cognitive biases.

The data show that humans are subconsciously primed (among other things) to prefer the status quo, to overvalue existing defaults, to follow others’ decisions, and to stick to the well-worn path. We have strong motives to justify existing legal, political, and social systems; to come up with simple explanations for observed phenomena; and to construct coherent narratives for the world around us. Taken together, these and other characteristics suggest that we value precedent not because it is desirable but merely because it exists. Three case studies—analyzing federal district court cases, U.S. Supreme Court cases, and development of American policy on torture—suggest that the theory of stare decisis as a heuristic

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<sup>1</sup> LEARNED HAND, THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 241 (Irving Dilliard ed., 1963) (1952).

has substantial explanatory power. In its strongest form, this hypothesis challenges the foundation of common law systems.

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A hundred and fifty years ago, Tocqueville wrote that the greatest outrage to an Anglo-American lawyer was accusing him of having an original thought. If one characterized the lawyer as being an innovator, "he will be prepared to go to absurd lengths rather than to admit himself guilty of so great a crime."<sup>2</sup> The common law system and its reliance on precedent, he wrote, forced lawyers to argue as though all of the rationale for their clients' position was compelled by pre-existing case law. Tocqueville was "surprised to hear [the common lawyer] quoting the opinions of others so often and saying so little about his own."<sup>3</sup> Conversely, a lawyer in the civil law system would "deal with no matter, however trivial, without . . . carry[ing] the argument right back to the constituent principles of the laws."<sup>4</sup>

Change comes slowly to the common lawyer. He "values laws not because they are good but because they are old," and if the law must be changed in some respect, "he has recourse to the most incredible subtleties in order to persuade himself that in adding something to the work of his fathers he has only developed their thought and completed their work."<sup>5</sup> Innovation is anathema to him.

Recent social psychological evidence suggests that Tocqueville was on to something—about all of us, not just those of us trained in the common law. Across a wide range of contexts, the data provide compelling evidence of humans' tendencies to prefer existing social systems and status quo endowments and a simultaneous subconscious "priming" to justify those existing defaults. If this is true, then the Anglo-American legal system, with its emphasis on *stare decisis* and adherence to precedent, exacerbates this human shortcoming.

Thence arises the title of this Article. Relying on precedent might be a good idea, or it might not. But it is clear that, rather than reflecting our "true preferences," the theory and practice of *stare decisis* are at least partially rooted in our cognitive biases. There are two ways this could be the case.

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<sup>2</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 268 (George Lawrence trans., J.P. Mayer ed. 1969).

<sup>3</sup> *Id.* at 267.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 268.

First, the practice of stare decisis may have evolved merely as a reflection of cognitive bias, and nothing more. This is the strongest, and most provocative, version of my argument. Second, the current practice of stare decisis may be yielding judicial decisions that are at least partially the product of heuristic judgments, resulting in socially-suboptimal results.

I use the term “precedent” very broadly here. Legal doctrine may expand or limit the role of precedent in various contexts.<sup>6</sup> However, as Frederick Schauer points out in his seminal article, *Precedent*:

Appeals to precedent do not reside exclusively in courts of law. Forms of argument that may be concentrated in the legal system are rarely isolated there, and the argument from precedent is a prime example of the nonexclusivity of what used to be called “legal reasoning.” Think of the child who insists that he should not have to wear short pants to school because his older brother was allowed to wear long pants when *he* was seven. Or think of the bureaucrat who responds to the supplicant for special consideration by saying that “we’ve never done it that way before.” In countless instances, out of law as well as in, the fact that something was done before provides, by itself, a reason for doing it that way again.

Reliance on precedent is part of life in general.<sup>7</sup>

Even though most of my examples are from court decisions, I use this broad conception of precedent in this Article—the form of reasoning that we humans use on a regular basis and one that affects almost every mode of legal analysis. This does not mean that reliance on precedent will always produce bad results. It does mean that we should be skeptical of legal rules that become entrenched merely by virtue of their longevity. As Oliver Wendell Holmes, Jr. wrote in *The Path of the Law*:

It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.<sup>8</sup>

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<sup>6</sup> See, e.g., *infra* notes 29-31 and accompanying text.

<sup>7</sup> Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 572 (1987) [hereinafter Schauer, *Precedent*]. Of course, I do not want to overplay this point. Schauer himself acknowledges that reasoning from precedent is certainly concentrated, and more important, in law than elsewhere. *Id.*

<sup>8</sup> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

A century earlier, Thomas Jefferson espoused a similar view. Requiring one generation to live under a Constitution set out by its predecessor, he wrote, was like “requir[ing] a man to still wear the coat which fitted him when a boy.”<sup>9</sup> To right this perceived wrong, he believed that the Constitution should contain a provision “for its revision at stated periods.”<sup>10</sup> Jefferson suggested that a mechanism for “doing this every nineteen or twenty years, should be provided by the Constitution; so that it may be handed on, with periodical repairs, from generation to generation.”<sup>11</sup>

In this sense, Jefferson’s ideas were anti-Burkean. Edmund Burke, the father of modern conservatism, implored men to trade on the “general bank and capital of nations, and of ages,” and to distrust their own “private stock of reason.”<sup>12</sup> Jefferson disagreed: “Each generation is as independent as the one preceding, as that was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness . . . .”<sup>13</sup>

Yet the common law system does not allow each court, or even each generation, to “choose for itself” that which “it believes most promotive of its own happiness,” making it more Burkean than Jeffersonian. In the American system, if an issue under consideration has been directly decided by the Supreme Court, lower courts are bound to reach the same result, “unless and until [the Supreme] Court reinterpret[s] the binding precedent.”<sup>14</sup> A lower court cannot disregard the rule merely because it thinks an alternative would be “most promotive of [the current generation’s] happiness.” It cannot even disregard the legal rule if “the grounds upon which it was laid down have vanished long since.”<sup>15</sup> As the Supreme Court has explained, “If a precedent of [the Supreme] Court has direct application in a

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<sup>9</sup> Letter from Thomas Jefferson to Samuel Kercheval (June 12, 1816), in 15 THE WRITINGS OF THOMAS JEFFERSON 32, 42 (Andrew A. Lipscomb & Albert E. Bergh eds., 1904).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 41. Jefferson did not arrive at the time frame by accident. The mortality tables of his day suggested that the majority of adults living in a given generation would be dead within nineteen years. *Id.* This gives rise to the shorthand formulation, that Jefferson believed that the Constitution should be rewritten every generation.

<sup>12</sup> EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 183 (W. Alison Phillips & Catherine Beatrice Phillips eds., 1912) (1790).

<sup>13</sup> Jefferson, *supra* note 9, at 42.

<sup>14</sup> *Agostini v. Felton*, 521 U.S. 203, 238 (1997).

<sup>15</sup> Holmes, *supra* note 8, at 469.

case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”<sup>16</sup> As a result, “[j]udges are . . . obliged to answer the same question in the same way as others have answered it earlier, even if they would prefer to answer it differently.”<sup>17</sup>

And so Jefferson and Holmes have not been heeded. Despite their protestations, we are old men wearing boys’ coats, abiding rules laid down in the time of Henry IV.<sup>18</sup>

However, there is more to this story. The provocative title notwithstanding, the thesis of this Article is not (only) that stare decisis is cognitive error. I want to draw further conclusions about the implications of cognitive bias for the common law system. Over the years, evidence from social psychology has made increasingly clear that humans’ actions do not conform to the “rational actor model,” as had been supposed, implicitly or explicitly, by economic and legal theory for decades. Evidence in the behavioral literature suggests that we humans tend to overvalue existing, historical, and traditional arrangements. Our cognitive biases are correlated, and they all suggest an undue reliance on the past. This ought to be of concern to lawyers, because the cornerstone of our legal system is reliance on prior decisions.

There are three possibilities: First, our common law system, and stare decisis, might be nothing more than reflections of a constellation of correlated cognitive biases. If this is true, then we are substantially worse off for relying on precedent, in all cases and at all levels, than we would be in a system where each case was approached with a blank slate. Second, in the weaker version of the argument, reliance on

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<sup>16</sup> *Rodriguez de Quijas v. Shearson*, 490 U.S. 477, 484 (1989) (emphasis added).

<sup>17</sup> Frederick Schauer, *Why Precedent in Law (and Elsewhere) is Not Totally (or Even Substantially) About Analogy*, 3 *PERSP. ON PSYCHOL. SCI.* 454, 454-60 (2008) [hereinafter Schauer, *Analogy*].

<sup>18</sup> This may actually understate the problem somewhat. King Henry IV ruled from 1589 to 1610. See JOHN P. MCKAY ET AL., 2 *A HISTORY OF WORLD SOCIETIES*, 466 (8th ed. 2008). Meanwhile, the Rule in *Shelley’s Case*, (1581) 1 Co. Rep. 93b (K.B.), actually predates the time of Henry IV. And there are several United States jurisdictions that still adhere to the rule, at least in part. See JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 298-99 (5th ed. 2002) (describing the rule); *id.* at 300 (noting that the rule still applies in Arkansas and to pre-abolition wills in jurisdictions that have abolished the rule non-retroactively, including Ohio, Illinois, and North Carolina).

precedent might generally be desirable. However, in close cases, judges should *not* rely on precedent, absent special justification, because they might be relying on precedent as a heuristic—a cognitive shortcut—and not because it yields the desirable result. Third and last, in the weakest version of the story, the fact that humans (and courts) are susceptible to these biases, while perhaps noteworthy, should not lead to any doctrinal change. In this weakest version, the argument in this Article would likely have little role to play in the context of “vertical stare decisis,” but some role in the context of “horizontal stare decisis.”<sup>19</sup>

This is not the first article to explore the implications of behavioral phenomena on the law. Nonetheless, it fills a gap in the existing literature in at least three ways. First, it builds on the extensive literature that has explained, in general terms, how insights from social psychology can and should change our understanding of legal theory.<sup>20</sup> Second, it continues the tradition of authors like Cass Sunstein (on information cascades),<sup>21</sup> Lawrence Lessig (on social norms),<sup>22</sup> and Adrian

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<sup>19</sup> Vertical stare decisis refers to the obligation of a lower court to follow the binding precedent set by a higher court in its jurisdiction. Horizontal stare decisis refers to the presumption that a court will decide current matters in line with the earlier decisions of the *same* court. See, e.g., Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. 1745, 1750-51 (2008) (describing the two kinds of stare decisis).

<sup>20</sup> Jon Hanson and his co-authors have been most prolific in this regard. The tandem articles *The Situation* and *The Situational Character* were groundbreaking articles that displaced the rational actor model with the “situational” model, informed by insights from social psychology. See generally Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003) [hereinafter Hanson & Yosifon, *The Situation*]; Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1 (2004) [hereinafter Hanson & Yosifon, *The Situational Character*]. Hanson’s more recent three-part project explains how situational insights explain recent trends in the development of legal doctrine and legal theory. See generally Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior are Shaping Legal Policy*, 57 EMORY L.J. 311 (2008); Adam Benforado & Jon Hanson, *Naïve Cynicism: Maintaining False Perceptions in Policy Debates*, 57 EMORY L.J. 499 (2008); Adam Benforado & Jon Hanson, *Legal Academic Backlash: The Response of Legal Theorists to Situationist Insights*, 57 EMORY L.J. 1087 (2008).

<sup>21</sup> See generally Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006).

<sup>22</sup> See generally Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

Vermeule (on group decision-making),<sup>23</sup> who explore the implications of specific psychological findings on the law. Third, the Article expands on works of authors who have focused on discrete psychological phenomena and written about them in the context of specific legal doctrines: the stickiness of default rules in contract law;<sup>24</sup> the endowment effect with regard to injunctions;<sup>25</sup> reimagining tort law<sup>26</sup> or corporate law<sup>27</sup> in light of social psychology; and so on.

The literature has thus far focused on broad questions of legal theory (by authors like Hanson) or on specific phenomena and doctrines (by Sunstein, Lessig, Vermeule, and others). This Article, focusing on the process of legal reasoning, is situated at the niche between broader questions of legal theory and more specific doctrinal questions.

This Article has three main parts. In Part II, I survey arguments for stare decisis. These arguments sound one (or more) of three themes: stare decisis (1) is more likely to lead to correct results; (2) fosters stability, predictability, and efficiency; (3) enhances the legitimacy of the courts.

In Part III, I catalogue various psychological phenomena that undercut arguments for stare decisis: we humans have a tendency to prefer the status quo (status quo bias); to overvalue existing entitlements (endowment effect); to make decisions based on others' choices (information cascades); and more. In addition, we are motivated to seek reasons for our choices that support existing legal, political, and social systems (system justification theory); to create coherent patterns from past occurrences (motive to cohere); and to develop simple explanations for observed phenomena (motive to simplify). Taken together, these phenomena cast significant doubt on arguments for stare decisis.

In Part IV, the heart of the Article, I describe three case studies that support my hypothesis. First, I make a series of

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<sup>23</sup> See generally Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482 (2007) [hereinafter Vermeule, *Common Law Constitutionalism*].

<sup>24</sup> Omri Ben-Shahar & John A. E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651 (2006).

<sup>25</sup> Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227 (2003).

<sup>26</sup> Jon Hanson & Michael McCann, *Situationist Torts*, 41 LOY. L.A. L. REV. 1345 (2008).

<sup>27</sup> Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1 (2004).



predictions regarding when a court's decision is more likely to reflect heuristic judgments rather than cogent reasoning. I examine court cases analyzing whether there is an implied private right of action under section 304 of the Sarbanes-Oxley Act, and conclude that the evolution of this legal rule over the past several years strongly suggests that the decisions reflect cognitive bias. In the second case study, I summarize Anuj Desai's recent articles regarding the Supreme Court's jurisprudence on certain First and Fourth Amendment doctrines to argue that this line of cases reflects the Supreme Court's reliance on precedent as a heuristic. Third, I find evidence of cognitive bias in the recent (and still-unfolding) series of developments with regard to the debate over the definition of torture and the treatment of detainees at Guantanamo Bay, Cuba. The issue of torture, in this context, arose against the background of the Global War on Terror. The war has led the American legal system into uncharted territory. In this situation, if anywhere, one might expect courts and policymakers to approach the questions presented with a clean slate. I will attempt to show that their unwillingness (or inability) to do so suggests a reliance on precedent not for its informational value, but because of decision-makers' attempt to seek out patterns and coherent doctrinal stories.

With these lessons in mind, Part V lays out three possible versions of my argument, which I alluded to above: that the practice of *stare decisis* is always unreliable; that *stare decisis* should be abandoned in close cases only; or that the Article's insights should result in no doctrinal changes. I leave it to the reader to decide which explication of the theory is most persuasive.

## II. ARGUMENTS FOR STARE DECISIS

We are afraid to put men to live and trade each on his own private stock of reason, because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations, and of ages.

—Edmund Burke<sup>28</sup>

In general, this Article takes aim at the practice of *stare decisis* and argues that, at least in certain situations and within

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<sup>28</sup> BURKE, *supra* note 12, at 183.

certain constraints, stare decisis may be unreliable. It is not my intention here to describe all of the arguments for stare decisis. Indeed, the nature and doctrinal scope of stare decisis vary by context: constitutional cases versus non-constitutional cases;<sup>29</sup> “pure” common-law cases, like contracts or torts, versus statutory cases;<sup>30</sup> in specific states, federal courts, or international courts;<sup>31</sup> and so on. These fine distinctions have practical and theoretical relevance in context. However, in this Article, I paint with a broad brush. I rely on the more general conception of stare decisis: “[t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.”<sup>32</sup> Stare decisis may have a horizontal component (where a court follows its own earlier-decided cases) and a vertical component (where a lower court follows a higher court’s earlier decided cases).<sup>33</sup> I also use the terms “stare decisis” and “precedent” interchangeably, although

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<sup>29</sup> See, e.g., Thomas E. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 703-04 (1999) (“Amidst all the contradictions and retractions in the modern Court’s doctrine of precedent, one point has achieved an unusual degree of consensus: that stare decisis has ‘great weight . . . in the area of statutory construction’ but ‘is at its weakest’ in constitutional cases.” (quoting *Neal v. United States*, 516 U.S. 284, 295 (1996); *Agostini v. Felton*, 521 U.S. 203, 235-38 (1997))); cf. Lee J. Strang & Bryce G. Poole, *The Historical (In)accuracy of the Brandeis Dichotomy: An Assessment of the Two-Tiered Standard of Stare Decisis for Supreme Court Precedents*, 86 N.C. L. REV. 969 (2008) (criticizing the dichotomy described above). Strang and Poole cite opinions by a variety of justices to demonstrate that this dichotomy has purchase on the Court along the political spectrum. See *id.* at 971-72 (citing Chief Justice Rehnquist, Justice Scalia, Justice O’Connor, and Justice Breyer).

<sup>30</sup> See, e.g., MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW*, at vii (1988) (noting in the Preface that his book focuses on “that part of the law that is not based on [authoritative] texts,” and that “the same set of principles” does not apply to “the interpretation of constitutions, the interpretation of statutes, and the establishment of common law rules”); see also Rafael Gely, *Of Sinking and Escalating: A (Somewhat) New Look at Stare Decisis*, 60 U. PITT. L. REV. 89, 109 (1998) (“[C]ommon law precedents enjoy a presumption of correctness stronger than that applied to constitutional cases, but not as constraining as that enjoyed by statutory precedents.”); Brian C. Kalt, *Three Levels of Stare Decisis: Distinguishing Common-Law, Constitutional, and Statutory Cases*, 8 TEX. REV. L. & POL. 277, 277-78 (2004).

<sup>31</sup> See, e.g., Raj Bhala, *The Power of the Past: Toward De Jure Stare Decisis in WTO Adjudication*, 33 GEO. WASH. INT’L L. REV. 873, 876 (2001); Thomas G. Field III, *The Role of Stare Decisis in the Federal Circuit*, 9 FED. CIR. B.J. 203, 204 (1999); Steven Gardner, *Contributory Negligence, Comparative Negligence, and Stare Decisis in North Carolina*, 18 CAMPBELL L. REV. 1, 3 (1996); David A. Hartquist et al., *Toward a Fuller Appreciation of Nonacquiescence, Collateral Estoppel, and Stare Decisis in the U.S. Court of International Trade*, 14 FORDHAM INT’L L.J. 112, 112 (1991); Jeffrey T. Renz, *Stare Decisis in Montana*, 65 MONT. L. REV. 41, 42 (2004); Mark Sabel, *The Role of Stare Decisis in Construing the Alabama Constitution of 1901*, 53 ALA. L. REV. 273, 274 (2001).

<sup>32</sup> BLACK’S LAW DICTIONARY 1537 (9th ed. 2009).

<sup>33</sup> See, e.g., Nash & Pardo, *supra* note 19, at 1750-51.

there is a slight difference between the two terms.<sup>34</sup> I use them interchangeably because “[w]hat I say here applies to both kinds of precedent.”<sup>35</sup> The argument in this Article may have more or less relevance in a particular doctrinal context, as the scope and role of precedent varies, but the basic point is the same.

Nonetheless, regardless of the context, *stare decisis* is defended for one or more of three primary reasons. First, *stare decisis* is defended because it is more likely to lead to correct results. This line of argument has its roots in Edmund Burke and other Burkean scholars, who argue that the reasoning ability of any given individual is small and that he would do better to rely on the received wisdom of his forebears. The Condorcet Jury Theorem is a different, but related, version of this argument.<sup>36</sup> The Theorem argues that under certain constraints, as the number of decision-makers increases, the probability of reaching the correct result approaches one.<sup>37</sup> Therefore, individual decision-making power is low; answers by large groups, over time, are more likely to be correct.

Second, *stare decisis* is defended on legal positivist grounds. These arguments generally bracket the question of whether the received rule is correct or not. Instead, they contend that reliance on established legal doctrines makes the law more stable over time; more predictable so that parties can arrange their matters in accordance with the law; and more efficient and therefore welfare-enhancing. In this Article, I use the shorthand “stability, predictability, and efficiency” to refer to these related arguments in support of *stare decisis*.

Finally, *stare decisis* is defended on the grounds that it preserves the legitimacy of the judiciary. In *Planned Parenthood v. Casey*,<sup>38</sup> the plurality reasoned that it was obligated to uphold the “essential holding” of *Roe v. Wade*, in

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<sup>34</sup> See Schauer, *Analogy*, *supra* note 17, at 6 n.2 (“Technically, the obligation of a court to follow previous decisions of the same court is referred to as *stare decisis* (‘stand by what has been decided’), and the more encompassing term *precedent* is used to refer both to *stare decisis* and the obligation of a lower court to follow decisions of a higher one.”).

<sup>35</sup> *Id.*

<sup>36</sup> See, e.g., Vermeule, *Common Law Constitutionalism*, *supra* note 23, at 1485-1501 (discussing “Burke as Condorcet”). But see David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEX. L. REV. 929, 943 n.49 (2008) (finding Vermeule’s argument “ultimately unpersuasive”).

<sup>37</sup> See, e.g., Paul H. Edelman, *On Legal Interpretations of the Condorcet Jury Theorem*, 31 J. LEGAL STUD. 327, 328 (2002).

<sup>38</sup> 505 U.S. 833 (1992).

part to preserve “institutional integrity.”<sup>39</sup> The plurality noted, among other things, that “the Court’s legitimacy depends on making legally principled decisions.”<sup>40</sup> If courts’ rulings were subject to the whims of the particular judge, then the public would lose faith in the judiciary.

#### A. *Burkean Traditionalism*

In its most basic form, stare decisis—“[t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation”<sup>41</sup>—acts as a check on radical change. If a court at time  $t+1$  is obligated to follow the decision of the court at time  $t$ , then it is less likely to be able to propound its own view of the case. Stare decisis acts as a limit on the ability of a given court to rely on its “private stock of reason.” In this sense, stare decisis has Burkean elements to it, undergirded by a sense that prior decisions are more likely to be correct than newer decisions.

In *Reflections on the Revolution in France*, Burke explained his disagreement with the French Revolution: though the movement’s values were ostensibly desirable, it was essentially a quick attempt to change the political structure of the French government. Rather than sudden change, Burke favored the wisdom found in tradition and noted the importance of connecting the current political system to the past:

By this unprincipled facility of changing the state as often, and as much, and in as many ways as there are floating fancies or fashions, the whole chain and continuity of the commonwealth would be broken. No one generation could link with the other. Men would become little better than the flies of a summer.”<sup>42</sup>

Burke explains that by abandoning traditions, people actually limit their own capabilities since they falsely believe they possess enough knowledge to create new political structures. Instead of working with the structures of the past to create a more stable government, they reduce themselves to “flies of a summer” with fleeting notions of how government ought to function.<sup>43</sup>

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<sup>39</sup> *Id.* at 845-46.

<sup>40</sup> *Id.* at 866.

<sup>41</sup> BLACK’S LAW DICTIONARY, *supra* note 32, at 1537.

<sup>42</sup> BURKE, *supra* note 12, at 91-92.

<sup>43</sup> *Id.*

Although Burke was not opposed to generating new ideas in general, he was opposed to their rapid implementation since he believed such an act was an insult to past generations of thinkers, as well as an abandonment of their legacy. The present generation, according to Burke, were simply “temporary-possessors” of their laws and constitutional heritage.<sup>44</sup> Therefore, “they should not think it amongst their right to cut off the entail, or commit waste on the inheritance, by destroying at their pleasure the whole original fabric of their society.”<sup>45</sup> If they did, they would not only “leave . . . a ruin” to those who came after them but also “teach[] these successors as little to respect the[ new institutions] as they had themselves respected the institutions of their forefathers.”<sup>46</sup> The past ought to be bellowed not merely because it was probably correct, but also because failure to do so demonstrated a lack of respect for one’s forebears.

Russell Kirk reflects on Burke’s desire to retain the wisdom of our predecessors, explaining that for Burke, “In the government of the nation, the people participated through their representatives—not *delegates*, but representatives, elected from the ancient corporate bodies of the nation, rather than from an amorphous mass of subjects.”<sup>47</sup> In other words, “ancient corporate bodies” still play a role in the present-day political system since their contributions make up essential elements of our current system of law.<sup>48</sup> A rapid abandonment of such contributions would result in unforeseen consequences.

This kind of Burkean thinking underlies (implicitly if not explicitly) the common law system, which relies on case law and precedent to help determine the outcome of current cases: “A constitutional order with a strong dose of common-law judicial definition and a proclaimed fidelity to precedent pushes in a Burkean direction.”<sup>49</sup> This theory of constitutional interpretation, implicit in the common law, “f[ound] its most famous expression in Burke’s great work.”<sup>50</sup> Rather than

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<sup>44</sup> *Id.* at 91.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> RUSSELL KIRK, *THE CONSERVATIVE MIND: FROM BURKE TO ELLIOT* 18 (7th ed. 2001).

<sup>48</sup> *Id.*

<sup>49</sup> Samuel Issacharoff, *Meriwether Lewis, the Air Force, and the Surge: The Problem of Constitutional Settlement*, 12 LEWIS & CLARK L. REV. 649, 668 (2008).

<sup>50</sup> David A. Strauss, *Why Conservatives Shouldn’t Be Originalists*, 31 HARV. J.L. & PUB. POL’Y 969, 973 (2008) (citation omitted).

determine how best to promote its own happiness, a given generation must be humble and respect the limits of rationality.<sup>51</sup> Although “judgments about morality, fairness, and justice” are permissible, they are only permissible “within the narrow confines left open by tradition.”<sup>52</sup>

Strauss, in turn, cites Calabresi, who writes that “in our constitutional culture there is actually a well-established Burkean practice and tradition of venerating the text and first principles of the Constitution and of appealing to it to trump both contrary case law and contrary practices and traditions.”<sup>53</sup>

Similarly—and still in the Burkean vein—defenders of stare decisis argue that overruling past decisions, even if they currently seem incorrect in the eyes of the judges, may prove a worse option, given that overturning precedent requires a sort of epistemological arrogance on the part of current judges.<sup>54</sup> Nelson explains that “this was particularly true when a long line of decisions had all reached the same conclusion. If a series of judges had all deemed something to be a ‘correct’ statement of the unwritten law, a later judge who doubted the statement ought to be modest enough to question his own position.”<sup>55</sup> Thus, both as a form of respect for tradition that Burke stressed, as well as for the actual information contained in precedent, prior decisions ought to be followed.

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<sup>51</sup> *Id.* Some contemporary authors, such as David Brooks, have written about the limits of human rationality. *See, e.g.*, David Brooks, *The Social Animal*, N.Y. TIMES, Sept. 12, 2008, at A23. But Brooks and others in the Burkean vein take this in a different direction than I do. Brooks argues that, because humans’ rationality is limited, we should be skeptical of programs that seek to impose broad-based change: the agenda of those who seek reform, he writes, are based on purportedly optimal, rational models; because humans are not perfectly rational, the reform is likely to fall short of its stated goals. *See, e.g.*, David Brooks, *The Big Test*, N.Y. TIMES, Feb. 24, 2009, at A25. Thus, Brooks relies on social psychology to argue in favor of Burkean traditionalism. *See id.* (acknowledging that “Burke ha[s] a point” and explaining that broad-scale agendas of change “set off my Burkean alarm bells”). Conversely, (one piece of) my argument is that Burkeanism *itself* could be seen as reflection of the status quo bias, endowment effect, and so forth. Brooks cites deviations from the rational actor model as a reason to be wary of large-scale efforts to address social problems. My argument is the opposite: we *should* be willing to entertain large-scale change (such as reimagining the role of precedent in our legal system)—but we should do so in a way that acknowledges how people really act, not an idealized vision of how they *might* act.

<sup>52</sup> Strauss, *supra* note 50, at 973.

<sup>53</sup> Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 637 (2006).

<sup>54</sup> *See* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedent*, 87 VA. L. REV. 1, 34 (2001).

<sup>55</sup> *Id.*

### B. *Stability, Predictability, Efficiency*

The Burkean position, that precedent should be followed because it was likely to be correct, undergirded the view, dominant in the nineteenth century, that the common law is the repository of the collected rationality of the Anglo-American people.<sup>56</sup> Edward Rubin characterizes this as “Langdell’s mythology,” but one that has persisted for quite some time.<sup>57</sup> However, as Rubin points out, for over a century, it had been clear that the common law was not a “natural” institution that reflected the right answers to all legal questions.<sup>58</sup> Instead, it arose out of an effort by King Henry II “to suppress dissension by displacing local law in England with a system of royal justice that would be common to the entire realm.”<sup>59</sup> Under this conception, reliance on precedent is desirable for instrumental reasons: it makes the law uniform, predictable, and stable.

In a civil law system, courts are generally not bound by prior decisions; they are always free to change course.<sup>60</sup> In the common law, however, *stare decisis* binds future courts to reach the same conclusion as prior courts, furthering the predictability of law.<sup>61</sup> Maltz gives a sharp example of the role of *stare decisis* in fostering predictability:

As an illustration of the point, consider the action of the Michigan Supreme Court in *Parker v. Port Huron Hospital*. In *Parker* the court abrogated the doctrine of charitable immunity, which had prevailed in the state since the decision in *Downes v. Harper Hospital*. Challenging the decision to overrule *Downes*, one might well

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<sup>56</sup> Edward Rubin, *What’s Wrong With Langdell’s Method, and What to Do About It*, 60 VAND. L. REV. 609, 623-26 (2007).

<sup>57</sup> *Id.* at 623-26.

<sup>58</sup> *Id.* at 616-31.

<sup>59</sup> *Id.* at 627.

<sup>60</sup> 1 MARCEL PLANIOL, TREATISE ON THE CIVIL LAW § 123 (La. State L. Inst. trans., 12th ed. 1939).

<sup>61</sup> Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 368-69 (1988). I should note that my argument has some application in civil law systems as well. The doctrine of *jurisprudence constante*, under which a particular rule of law is to be given weight if many courts have reached that same decision, is the civil law analogue to the common law’s *stare decisis*. One distinction between the doctrines is that *jurisprudence constante* requires a large number of courts to have reached the same conclusion, while a single case can have precedential effect in a common law system. See, e.g., *Willis-Knighton Med. Ctr. v. Caddo-Shreveport Sales & Use Tax Comm’n.*, 903 So.2d 1071, 1088 n.17 (La. 2005). The concerns I highlight below, such as cascades, status quo bias, and so on, apply even in the civil law context. The problem may be mitigated because *jurisprudence constante* has persuasive, rather than binding, effect, see, e.g., *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119, 128 (La. 2000), but it would be present nonetheless.

conclude that charitable institutions planned their activities and budgets with the assumption that they would be immune from tort liability. Based on the same assumptions, these institutions may have failed to obtain liability insurance. Thus, the argument would conclude, *Parker* was wrongly decided because it defeated the justified expectations of the institutions relying on the *Downes* rule.<sup>62</sup>

By this argument, stare decisis enables individuals to predict consequences and act accordingly. This also prompts stability in the law, since judges cannot make arbitrary decisions. This could be particularly true in property law: “if titles had passed in reliance on [prior rules] or if people had otherwise conducted transactions in accordance with them—the resulting reliance interests could provide a reason to adhere to decisions even if they were now deemed erroneous.”<sup>63</sup> In such cases, maintaining a commitment to past decisions in order to ensure and protect reliance interests remains an important feature of the argument in favor of the advantages of stare decisis, even against critics’ claims that an “important value is getting the right answer to critical questions of constitutional meaning.”<sup>64</sup> The Supreme Court has endorsed such a view, commenting that “[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved.”<sup>65</sup> The instrumentalist view finds perhaps its most famous expression in the words of Justice Brandeis: “*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.”<sup>66</sup> Stare decisis prevents the disruption that would occur if judges were constantly seeking the “correct” rule.

Relying on precedent also helps ensure efficiency in the common law system. Cardozo explains that by relying on precedent, current judges expedite the decision-making process. Through stare decisis, “[a] stock of judicial conceptions and formulas is developed, and we take them, so to speak,

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<sup>62</sup> *Id.* (citations omitted). Maltz goes on to note, however, that the new rule was made prospective in application, so charities that had relied on the old rule would not be affected. *Id.* at 369.

<sup>63</sup> Nelson, *supra* note 54, at 20.

<sup>64</sup> Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 CONST. COMMENT. 311, 329 (2005).

<sup>65</sup> *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

<sup>66</sup> *Burnet v. Coronado Oil*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (emphasis added).



ready-made.”<sup>67</sup> Thus, judges can draw on this bank, avoid having to rethink each legal question, and consider more cases than would be otherwise possible.<sup>68</sup> “[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.”<sup>69</sup> This argument has found purchase even at the Supreme Court.<sup>70</sup>

Some critics argue that relying on precedent without recognizing that past decisions might have been incorrect is misguided. However, supporters of stare decisis point out that the benefits of maintaining past decisions far outweigh the consequences. In fact, while Nelson recognizes there might be instances where past precedent is undoubtedly incorrect, falling beyond even the wide range of possible outcomes associated with each case, he suggests that these instances might be the exception and in general, upholding stare decisis proves more valuable than not.<sup>71</sup>

There is another component to the argument that stare decisis promotes efficiency. Some scholars argue, essentially following Posner, that the common law system *is and has been* geared toward economic efficiency. In their classic book on tort law, Landes and Posner write that “the common law of torts is best explained as if the judges who created the law . . . were trying to promote efficient resource allocation.”<sup>72</sup> Posner does not cabin this theory to tort law; he believes that the common law is best explained as a system of wealth-maximizing rules.<sup>73</sup> “The gist of that contention is that in a common law system there are incentives for repeat players to litigate inefficient rules but not to litigate efficient rules; [however judges decide a case,] this mechanism will inevitably lead to an increase in the stock of efficient legal rules.”<sup>74</sup> This convergence-on-efficiency

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<sup>67</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 47-48 (1921).

<sup>68</sup> Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 626 (2001).

<sup>69</sup> CARDOZO, *supra* note 67, at 149.

<sup>70</sup> Fla. Dep’t of Health and Rehab. Services v. Fla. Nursing Home Ass’n, 450 U.S. 147, 154 (1981) (Stevens, J., concurring) (noting that “[t]hese concerns are not . . . insubstantial”) (citing CARDOZO, *supra* note 67, at 149).

<sup>71</sup> *Id.*

<sup>72</sup> WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 1 (1987).

<sup>73</sup> RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 26 (6th ed. 2003).

<sup>74</sup> Nuno Garoupa & Thomas S. Ulen, *The Market for Legal Innovation: Law and Economics in Europe and the United States*, 59 ALA. L. REV. 1555, 1589 (2008).

theory has its roots in Lord Mansfield's proclamation that the common law "works itself pure,"<sup>75</sup> the hypothesis that bad rules will get weeded out over time.

Thus, whether the focus is on the time that judges save or the maximization of social wealth, scholars for centuries have argued that reliance on precedent furthers efficiency.<sup>76</sup>

### C. *Judicial Legitimacy*

Courts follow precedent because it is correct or in the interest of stability. But they also do so for a third reason: because it furthers judicial legitimacy: "One of the most widely shared values in the American political system is that principles governing society should be 'rules of law and not merely the opinions of a small group of men who temporarily occupy high office.' The doctrine of stare decisis reinforces this value . . . ."<sup>77</sup> Maltz points out that stare decisis (1) simply makes judicial decisions *look* better, because the instant decision is based on pre-existing law and not impulsive preferences; and (2) implies a judicial role of "law-finding" and not "law-making," a value that does in fact limit judicial discretion.<sup>78</sup>

Along these lines, Nelson notes, "According to many commentators, frequent overruling jeopardizes public acceptance of the courts' decisions."<sup>79</sup> The joint opinion of Justices Souter, Kennedy, and O'Connor in *Planned Parenthood v. Casey* states, "[t]he Court's power lies . . . in its legitimacy."<sup>80</sup> Nelson explains that for these Justices it was important to adhere to the core holding of *Roe v. Wade* so that the country would not lose "confidence in the Judiciary."<sup>81</sup> In this respect, stare decisis helps maintain the legitimacy of the court. In the absence of stare decisis, the public might lose faith

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<sup>75</sup> *Omychund v. Barker*, (1744) 26 Eng. Rep. 15, 23 (Ch.).

<sup>76</sup> Most behavioral critiques of the common law tend to focus on this efficiency argument. For example, Hanson and Hart have argued persuasively that the famous "BPL" formula developed by Judge Learned Hand, often cited as an example of the efficiency of the common law of negligence, does not in fact yield the efficient outcome in that case. See Jon D. Hanson and Melissa Hart, *Law and Economics*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 311, 311-31 (Dennis Patterson ed., 1996).

<sup>77</sup> Maltz, *supra* note 61, at 371 (citation omitted).

<sup>78</sup> *Id.* at 371-72.

<sup>79</sup> Nelson, *supra* note 54, at 68.

<sup>80</sup> 505 U.S. 833, 983 (1992).

<sup>81</sup> Nelson, *supra* note 54, at 68 (citing *Casey*, 505 U.S. at 865, 867).

in the courts and therefore doubt the strength of the rule of law.

#### D. Conclusion

In short, stare decisis is defended for any or all of the preceding reasons. In the next Part, I catalogue common cognitive and psychological phenomena that undercut these arguments for stare decisis.

### III. COGNITIVE BIASES THAT UNDERCUT ARGUMENTS FOR STARE DECISIS

If precedent represents a weak or impoverished learning device, then a common law system of adjudication seems unlikely to produce reliable results.<sup>82</sup>

As described in the previous Part, there are many reasons a system of stare decisis is desirable. These goals might be worth pursuing and might even be correct on their own terms. Nevertheless, the behavioral literature of recent years gives us serious reason to question the *epistemic basis* of those arguments. In turn, we should be skeptical of using stare decisis as a decisional guidepost. In this Part, I survey that behavioral literature.

Three preliminary points are in order: First, the following discussion is not meant to be exhaustive. There may be other behavioral phenomena that support my thesis; I only discuss those that are most relevant to my argument and relatively well known. Second, I do not discuss the phenomena in much depth. I summarize the key findings of the literature to the extent necessary to develop the doctrinal application of the literature. The interested reader can find citations to the underlying papers, studies, and experiments in the footnotes. Finally, much of the discussion tracks that set forth by Hanson and Yosifon in *The Situational Character*, which provides some

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<sup>82</sup> Eric Talley, *Precedential Cascades: A Critical Appraisal*, 73 S. CAL. L. REV. 87, 91 (1999). Talley ultimately concludes that precedent cannot be fully explained by cascades. *Id.* at 92. But crucially, he reaches this conclusion because his analysis focuses exclusively on cascades and not other cognitive biases. *See id.* Unlike Talley's paper, my analysis surveys a variety of cognitive and behavioral phenomena. The position I advance is not that precedent represents an information cascade, but that a broad range of phenomena (including cascades) suggest that precedent may not be advancing the goals we think it advances for the reasons we think it is advancing them. I respond more fully to Talley near the end of this Article. *See infra* notes 376-382 and accompanying text.

more detail on the phenomena I discuss as well as a broader survey of such phenomena.<sup>83</sup>

At the end of this Part, I make a bold claim: the behavioral evidence gives us very strong reason to believe that the common law system (1) reflects cognitive biases; (2) magnifies cognitive biases; or (3) does both. I use “common law” loosely here. The critique applies to typical common law subjects, like contracts or torts, but also to statutory and even constitutional interpretation. It applies to federal courts and state courts, trial courts and appellate courts. It applies to the Supreme Court of the United States and it applies to district courts. It applies to instances where courts rely on prior court decisions as well as instances where they rely on earlier statutes or other sources. It even applies to legal policymaking in general, that is, not just to court decisions. In short, the critique applies very broadly.

In a slightly different context, Adrian Vermeule writes, “The key point is not that judges are likely to get things wrong; it is that when they do get things wrong, they are likely to err in systematic rather than random ways.”<sup>84</sup> Work from several academic disciplines shows that we humans possess a series of correlated biases that make us more likely to favor existing conditions, overestimate the costs of change, and underestimate the benefits of new social arrangements. If these phenomena motivate us, consciously or not, to overvalue what we already possess, then a legal system designed to rely almost exclusively on past decisions probably places too much emphasis on the past. The presence of correlated biases should be of great concern to legal scholars and policymakers.

#### A. *Choice Biases*

Hanson and Yosifon describe choice biases as those which “most clearly influence (and challenge economists’ typical assumptions regarding) people’s *choices*.”<sup>85</sup> Recall that, according to the dominant view, stare decisis is defended because it leads to correct adjudication, stability, efficiency, and legitimacy. If lawyers’ and judges’ choices are shaped by these heuristics and biases, then decisions that we *think* foster these desirable goals may instead be reflecting the fact that we

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<sup>83</sup> Hanson & Yosifon, *The Situational Character*, *supra* note 20.

<sup>84</sup> Vermeule, *Common Law Constitutionalism*, *supra* note 23, at 1501.

<sup>85</sup> Hanson & Yosifon, *The Situational Character*, *supra* note 20, at 39.

are “cognitive misers”<sup>86</sup> trying to avoid “the intolerable labor of thought.”<sup>87</sup>

### 1. Cascades

Stare decisis typically requires subsequent courts to follow the decisions of prior courts. The subsequent court, in its written decision, typically explains why it was *correct* that it follow the prior decision. But what if the later court’s reasoning was subconsciously skewed? What if the later court had reason to know the prior decision was probably inapplicable—but followed it anyway? As described below, the phenomenon known as “cascades” suggests that might be exactly what happens: subsequent decision-makers will follow a decision that was made at some earlier time, merely because it was popular—not because doing so is “correct” or “preferable” in any objective sense.

Scholars generally distinguish between three different types of cascades: information cascades, reputational cascades, and availability cascades.<sup>88</sup> As Kuran and Sunstein write, an informational cascade “occurs when people with incomplete personal information on a particular matter base their own beliefs on the apparent beliefs of others.”<sup>89</sup> A reputational cascade is a similar case, in which “people take to speaking and acting as if they share, or at least do not reject, what they view as the dominant belief.”<sup>90</sup> The combination of the two—when informational and reputational cascades “exhibit interactions and even feed on one another”—is known as an availability cascade.<sup>91</sup>

The phenomenon of cascades—particularly information cascades—has relevance in law.

A strictly informational cascade occurs when people start attaching credibility to a proposition P (e.g., a certain abandoned waste dump is dangerous) merely because other people seem to accept P. To recast an earlier illustration, suppose that Ames signals that he believes P. Barr, who would otherwise have major reservations,

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<sup>86</sup> *Id.* at 23.

<sup>87</sup> HAND, *supra* note 1, at 241.

<sup>88</sup> See, e.g., Sushil Bikhchandani, David Hirschleifer & Ivo Welch, *Learning from the Behavior of Others: Conformity, Fads, and Informational Cascades*, 12 J. ECON. PERSP. 151 (1998); Kuran & Sunstein, *supra* note 21, at 685.

<sup>89</sup> Kuran & Sunstein, *supra* note 21, at 685-86.

<sup>90</sup> *Id.* at 686-87.

<sup>91</sup> *Id.* at 687.

believes P because Ames appears to do so. Cotton, who would have dismissed the proposition as silly, begins taking it seriously upon discovering that not just Ames but both he and Barr are believers. Noticing that Ames, Barr, and Cotton all seem alarmed, Douglas then accepts P without further thought. When Entin learns that all of his friends believe P, he joins the pack of believers on the grounds that their shared understanding cannot be wrong.<sup>92</sup>

The problem, of course, is that everyone believed P merely because Ames did, even if, in some cases, they had information that would have led them to conclude otherwise!

In a recent study, Salganik and his co-authors describe the results of a music downloads study.<sup>93</sup> Participants in the study had the opportunity to download one of a range of songs. However, the authors introduced an element of social influence: participants could see what songs were being downloaded by others in a sort of “most popular songs” list. (The list, of course, could be manipulated.) In general, the best songs never did very badly, and the worst songs did not do particularly well. However, “almost any other result is possible.”<sup>94</sup> When songs were on the list of popular songs, participants downloaded those songs. In other words, the mere signal of a song’s popularity increased the frequency of downloads—as participants received a “relatively weak” information signal.<sup>95</sup> The increased downloads created a sort of feedback loop, and those songs moved up on the list of popular songs. In making these seemingly independent decisions, participants were susceptible to significant social influence and demonstrated an information cascade.

It is important to note that information cascades are not necessarily irrational. As Vermeule writes, an information cascade occurs when “individuals *rationaly* allow[ed] the *presumed* information of others to swamp their private judgments.”<sup>96</sup> If you have better information than I do, then it is

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<sup>92</sup> *Id.* at 721. The authors explain that reputational and availability cascades involve some element of social pressure. I do not dwell on those here, not because they are not relevant but, for simplicity’s sake, I assume that judges face no social or reputational pressures. Of course, this assumption may not be correct—but to the extent that the assumption does not hold, my argument is even stronger.

<sup>93</sup> Matthew J. Salganik et al., *Experimental Study of Inequality and Unpredictability in the Artificial Cultural Market*, SCI. MAG., Feb. 10, 2006, at 854.

<sup>94</sup> *Id.* at 855.

<sup>95</sup> *Id.* at 854-55.

<sup>96</sup> Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS (forthcoming 2009) (manuscript at 28, available at <http://ssrn.com/abstract=1087017>) [hereinafter Vermeule, *Many-Minds*] (emphasis added).

quite rational for me to follow your decisions. The problem arises when I *assume* you have better information and you don't. As I describe in the next Part, certain phenomena may alert us to the presence of a cascade.

## 2. Status Quo Bias

Information cascades are an external influence on individuals' decision-making; the external cues of popular songs influence private choices about what to download. Status quo bias, on the other hand, is an internal influence on choice. It operates regardless of what is happening around us.

Kahneman and his co-authors discuss status quo bias in their article on "anomalies"—psychological phenomena that are difficult to fit into the rational actor model, because "implausible assumptions are necessary to explain it within the paradigm."<sup>97</sup> Status quo bias is such an anomaly. In one experiment, individuals were asked to choose between several alternatives. In the "neutral" setting, they were simply asked to make a choice. In the "status quo" setting, one was the current arrangement, and they were asked to stick with the status quo option or choose an alternative. "Many different scenarios were investigated, all using the same basic experimental design. . . . The[] results implied that an alternative became significantly more popular when it was designated as the status quo. Also, the advantage of the status quo increases with the number of alternatives."<sup>98</sup> In another study, consumers were asked to choose among utility providers. Some respondents currently had very reliable utility service. Approximately sixty percent of those respondents expressed a "preference" for high-reliability service. Other respondents currently had unreliable utility service. Approximately sixty percent of *those* respondents expressed a preference for *low*-reliability service. Among both groups, only about five percent were willing to switch to the other option.<sup>99</sup> In both cases, individuals "demonstrated a pronounced status quo bias."<sup>100</sup> The remarkable point is that even those with *unreliable* service

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<sup>97</sup> Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 193 (1991).

<sup>98</sup> *Id.* at 198.

<sup>99</sup> *See id.*

<sup>100</sup> *Id.*

said they preferred it! The devil we know truly is more comforting—even when we know it is suboptimal.

Kay, Jimenez, and Jost explain our preference for the actual and anticipated status quo through the twin examples of sour grapes and sweet lemons. They write that humans have a large capacity for rationalization, even in suboptimal situations. “It has been argued that people possess a ‘psychological immune system’ that allows them to adjust to suboptimal outcomes by enhancing the subjective value of the status quo while devaluing alternatives to it.”<sup>101</sup> The sour grapes/sweet lemons analogy helps explain how humans rationalize situations by bringing “preferences into line with expectations.”<sup>102</sup> In the famous fable, the grapes are initially attractive. However, once the grapes become unattainable, they “become” sour. Of course, the character of the grapes has not changed at all; we merely rationalize the fact that we know we cannot get the grapes by *making ourselves believe* the grapes are sour. More interesting, however, is the “sweet lemons” phenomenon. In this situation, an initially less favored outcome (the lemon) becomes more favorable as the likelihood of such an outcome becomes greater—the lemons become sweeter if they are the more attainable.<sup>103</sup> (This begins to cross over into system justification theory, which I discuss in Part III.B.1, *infra*.)

Rationalization of the anticipated status quo demonstrates humans’ strong tendency to adapt to, and “prefer” the status quo. We justify events that are *likely* to happen, even those that initially seem unfavorable, just as we justify the *already* existing status quo. In other words, if we already have lemons, we are likely to justify our possession of lemons by believing they are sweet rather than try to get grapes which are more unattainable, and therefore we believe them to be sour. In Kay et al.’s study, survey respondents (prior to the 2000 election) were told that George W. Bush’s election was very likely based on certain polls. In light of this information, Republicans *and Democrats* increased their favorability rating of Governor Bush.<sup>104</sup> The same result, in the

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<sup>101</sup> Aaron C. Kay, Maria C. Jimenez & John T. Jost, *Sour Grapes, Sweet Lemons, and the Anticipatory Rationalization of the Status Quo*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1300, 1300 (2002).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 1309-10.

<sup>104</sup> *See id.* at 1305-06.



opposite direction, occurred when respondents were told that polls showed Vice President Gore likely to win.<sup>105</sup> In short, we “accommodate, internalize, and even *rationalize* key features” of the status quo.<sup>106</sup> When given a menu of options, we tend to choose the status quo, and when a given arrangement is about to become the status quo, we are remarkably adept at coming up with reasons why it is sweet and all others are sour.

### 3. Endowment Effect

One reason we may prefer the status quo is because we over-value it relative to other options. As Russell Korobkin explains, “The much studied ‘endowment effect’ stands for the princip[le] that people tend to value goods more when they own them than when they do not.”<sup>107</sup> Jones and Brosnan define the endowment effect as “a psychological phenomenon that appears to underlie some seemingly irrational pricing of property and to thereby impede efficient exchange.”<sup>108</sup> The endowment effect challenges the Coase Theorem, because the party holding a certain entitlement has an above-market willingness to accept price. When the other party is only willing to pay the market price, the entitlement will not change hands.<sup>109</sup> This has legal implications because the Coase Theorem suggests that, among other things, (when transaction costs are low) parties will bargain around injunctions and other legal entitlements regardless of the initial allocation of those entitlements. However, given the endowment effect, the efficient outcome is not likely to occur.<sup>110</sup>

In Knetsch’s oft-cited study, one group of students was offered a choice between a coffee mug and a chocolate bar as compensation for participating in the experiment. The second

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<sup>105</sup> See *id.*

<sup>106</sup> John T. Jost et al., *A Decade of System Justification Theory*, 25 POL. PSYCHOL. 881, 912 (2004).

<sup>107</sup> Korobkin, *supra* note 25, at 1228.

<sup>108</sup> Owen D. Jones & Sarah F. Brosnan, *Law, Biology, and Property: A New Theory of the Endowment Effect*, 49 WM. & MARY L. REV. 1935, 1939 (2008).

<sup>109</sup> Korobkin, *supra* note 25 at 1231.

<sup>110</sup> See, e.g., Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373, 421 (1999) (“A study of twenty old-fashioned nuisance cases litigated to judgment revealed no bargaining after judgment in any of them. Nor did any of the lawyers contacted believe that bargaining after judgment would have occurred if the loser had won.”); Daniel Khaneman, Jack L. Knetsch & Richard Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1345-46 (1990).

group was given a coffee mug initially, and then given the opportunity to trade it for a chocolate bar at the end of the experiment. The third group was given a chocolate bar at the beginning of the experiment, and then at the end was given the opportunity to trade it for a coffee mug. The results of the experiment showed that under the choice condition given to the first group, fifty-six percent of the students selected the mug. However, each of the other two groups exhibited a strong preference for what they already had: ninety percent of those given the mug refused to trade it for a chocolate bar while ninety percent of those given the chocolate bar refused to trade it for the mug. Each group “preferred” its initial endowment, even though, given a choice, preferences were about fifty-fifty.<sup>111</sup>

It is worth noting that, for purposes of my analysis, it is not especially important *why* the endowment effect, or any of these phenomena, actually occur. Jones and Brosnan attempt to explore this question, and posit that the so-called “irrational” psychological phenomena may include some number “that once (and indeed long) were substantively rational, in the traditional economic sense,”<sup>112</sup> but no longer are. However, this is not relevant to the first-level analysis. If humans exhibit certain tendencies that make them over-reliant on precedent, loosely defined, that finding has important implications for the law. *Why* the endowment effect occurs is relevant to the second-level analysis, the “So what?” question. If we are concerned about these biases and want to use procedural or other methods to debias lawyers and judges, then it is helpful to know how and why these phenomena occur. However, their origins are not necessarily relevant to my overall argument that these phenomena undercut arguments for stare decisis.

#### 4. Framing Effect

Earlier, I noted that the desirability of a policy option increases if it is described as the status quo. This is a version of the framing effect. Gonzalez et al. explain that

the “framing effect” is observed when a decision maker’s risk tolerance (as implied by their choices) is dependent upon how a set of options is described. Specifically, people’s choices when faced with consequentially identical decision problems framed positively (in

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<sup>111</sup> Jack L. Knetsch, *The Endowment Effect and Evidence of Nonreversible Indifference Curves*, 79 AM. ECON. REV. 1277, 1278-79 (1989).

<sup>112</sup> Jones & Brosnan, *supra* note 108, at 1959-60.

terms of gains) versus negatively (in terms of losses) are often contradictory.<sup>113</sup>

As a result, individuals prefer sure gains to risky gains and prefer risky losses to sure losses.<sup>114</sup>

Kahneman and Tversky, who identified and named the phenomenon, describe the framing effect as “both pervasive and robust.”<sup>115</sup> Moreover, it is “as common among sophisticated respondents as among naive ones.”<sup>116</sup> This point is particularly relevant to the law. One easy way to dismiss the discussion of these phenomena is to posit that they manifest themselves in trivial settings like controlled studies involving chocolate bars. However, on closer inspection, that claim does not hold water. Kahneman and Tversky’s studies show that the framing effect affects sophisticated respondents. Moreover, as discussed above, people demonstrate a strong status quo bias even when they believe their responses will affect policy.<sup>117</sup> The endowment effect is a barrier to post-judgment bargaining in real-life lawsuits, when individuals presumably have important interests at stake.<sup>118</sup> Respondents report support for an undesirable status quo even when presented with the important—and divisive—issue of a presidential election. In sum, the facile response, “Sure, but that wouldn’t happen in *real life* when judges are faced with *serious issues*,” is not compelling. Indeed, as I show in Part IV.A.2, heuristic judgments are reflected even at the United States Supreme Court.

## 5. Path Dependence

Path dependence is another example of how individuals demonstrate an undue deference toward existing arrangements. Pierson explains that our current perception of political and economic outcomes is informed by the timing in which the initial political or economic decision was made.

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<sup>113</sup> Cleotilde Gonzalez et al., *The Framing Effect and Risky Decisions*, 26 J. ECON. PSYCHOL. 1, 2 (2005).

<sup>114</sup> *Id.* at 13.

<sup>115</sup> Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOL. 341, 343 (1984).

<sup>116</sup> *Id.* at 343. The preceding two sentences track Hanson and Yosifon’s description of the framing effect. See Hanson & Yosifon, *The Situational Character*, *supra* note 20, at 42-43.

<sup>117</sup> See *supra* notes 99-100 and accompanying text.

<sup>118</sup> Farnsworth, *supra* note 110, at 413.

Therefore, a seemingly minor decision gains significance as it is propagated over time and more people become accustomed to the consequences of that decision.<sup>119</sup> Liebowitz and Margolis provide an example of path dependency using the concept of videotaping formats, Beta and VHS.<sup>120</sup> They explain that an initial decision by consumers to use VHS, without previous knowledge as to which format provides better quality, might have much greater implications in the future if, based on this arbitrary decision, everyone continues to buy VHS for compatibility purposes.

Liebowitz and Margolis define three different degrees of resulting path dependency. First degree path dependency explains that these initial decisions are made at random and thus efficiency models cannot predict which format will be chosen. With first degree path dependency, there is no inefficient outcome regardless of which option the public chooses, assuming that Beta and VHS provide similar quality. If over time it becomes apparent that Beta is the better option, then second degree path dependency occurs. In this scenario, choosing arbitrarily was rational given the initial conditions of limited knowledge as to which option was better. However, in retrospect (once we know that Beta is superior), the public realizes that the wrong decision was made initially. Third degree path dependency takes this one step further, assuming conditions where Beta was known to be superior from the start. If a small initial majority of consumers were to choose VHS, customers who prefer Beta—but have not yet made a decision—might choose VHS, unaware that others might also prefer Beta. If the present-day benefits of switching from VHS to Beta outweigh the costs, yet consumers remain hesitant to switch because they are unwilling to leave their current system, third degree path dependency occurs again.<sup>121</sup>

Pierson explains that path dependence is significant because individuals become accustomed to current conditions, regardless of why and when they occurred. Thus, costs of switching increase over time, and the originally-arbitrary decision becomes lasting and substantial.<sup>122</sup> Pierson relates this

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<sup>119</sup> Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 251 (2000).

<sup>120</sup> S.J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-In and History*, 11 J.L. ECON. & ORG. 205, 208-09 (1995).

<sup>121</sup> Liebowitz & Margolis, *supra* note 120, at 208-09.

<sup>122</sup> Pierson, *supra* note 119, at 252.

concept to increasing returns to scale, stating, “in an increasing returns process, the probability of further steps along the same path increases with each move down the path . . . . To put it a different way, the costs of exit—of switching to some previously plausible alternative—rise.”<sup>123</sup> He then explains that “formal, change-resistant institutions” are especially susceptible to this process, since the cost and ambiguity associated with exit remain high. Pierson concludes that understanding path dependency provides “an important caution against a too easy conclusion of the inevitability, ‘naturalness,’ or functionality of observed outcomes,”<sup>124</sup> cautioning us to consider that current institutions might not have been derived from an understanding of efficient conditions, but instead created based on conditions that are not only ancient but also initially arbitrary. As Mark Roe points out, path dependence means that “survival does not imply present-day superiority to untried alternatives.”<sup>125</sup>

In her article on path dependence and stare decisis, Oona Hathaway distinguishes between increasing returns path dependence, evolutionary path dependence, and sequencing path dependence.<sup>126</sup> The first category has its roots in the economics literature. Once a given decision is made, it is less costly to continue down that same path than to change to a different path. In this context, path dependence arises out of increasing returns.<sup>127</sup> Evolutionary path dependence has its origins in the biological literature, in which the current genetic makeup of a species is constrained by its past evolutionary changes.<sup>128</sup> Sequencing path dependence refers to the process by which the *order* in which choices are made affects the *outcomes* of those choices. In other words, if ten people need to make a

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<sup>123</sup> *Id.* at 253.

<sup>124</sup> *Id.*

<sup>125</sup> Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 644 (1996).

<sup>126</sup> Hathaway, *supra* note 68, at 605.

<sup>127</sup> *Id.* at 606-07.

<sup>128</sup> *Id.* at 607. The “evolutionary” reference suggests a question that I do not address in this Article: might stare decisis be problematic in certain cases but nonetheless “adaptive” and therefore optimal in the long run? Although this may be the case, I would argue otherwise. My criticism is not of the substantive results produced by a system based on precedent but the reasoning process by which we arrive at those decisions. Changing the time horizon (isolated case studies versus long term) does not change that basic point.

decision seriatim, each person's individual decision could be affected by where he chooses in the lineup.<sup>129</sup>

## 6. Sticky Defaults

Relatedly, individuals are generally hesitant to deviate from current conditions because of the ease with which default rules get entrenched. *On the Stickiness of Default Rules*, by Ben-Shahar and Pottow, explores the factors prompting parties to continue using undesirable (but waivable) default rules in contract law, even when opting out of a legal default rule did not impose high costs or ambiguous outcomes on the parties.<sup>130</sup> The first reason they explain for this irrational phenomenon is that “in the presence of a familiar and commonly utilized background provision . . . a transactor might fear that proposing an opt-out from the default will dissuade his potential counterparty from entering into the agreement.”<sup>131</sup> The counterparty may view any opt-out from the default as a “trick,” used to cover up an unknown problem.<sup>132</sup> Therefore, regardless of the practicality and efficiency of opting out of a default rule, a party might stick with the default rule since it attracts less suspicion and might hinder forming an agreement. This becomes especially apparent in areas where “it is uncommon for other market participants to negotiate a tailored provision, that is, where the background rules and templates are well entrenched and commonly employed.”<sup>133</sup>

Ben-Shahar and Pottow further explain that the default rules might work in a similar manner to the concepts underlying the endowment effect. If a legal default is viewed as an entitlement, and added value is placed on a legal default because an individual already possesses or understands that default, then he will be less likely to opt out of the default. Based on Korobkin's experiment investigating the endowment effect, Ben-Shahar and Pottow conclude that the “findings do, indeed, lend support to the conclusion that human beings are

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<sup>129</sup> *Id.* at 607-08. What Hathaway calls “sequencing path dependence” is similar to what I refer to in Part III.A.1 as an information cascade. *See id.* at 608 n.20 (describing and then distinguishing the two).

<sup>130</sup> Ben-Shahar & Pottow, *supra* note 24, at 651.

<sup>131</sup> *Id.* at 652.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 653.

cognitively disposed to prefer a default legal rule in contractual negotiations, irrespective of the content of that legal rule.”<sup>134</sup>

Also stemming from Korobkin’s experiments on the endowment effect, Ben-Shahar and Pottow find that individuals prefer legal default rules because choosing an opt-out option might leave individuals with a greater feeling of regret.<sup>135</sup> Korobkin finds that individuals prefer options in which they do not have to take action to change the current situation. Even if individuals are not happy with a current situation, the perception that they will be worse off after changing the situation (whether or not that perception is correct) provides a powerful disincentive to change, since individuals might then regret their action.<sup>136</sup> In this sense, regret is worse than accepting the current sub-optimal situation. Thus, Ben-Shahar and Pottow conclude “the attractive role of inaction in the service of ‘regret avoidance’ by decisionmakers”<sup>137</sup> provides a powerful motive to stick with commonly-known default rules.

### *B. Attitudes and Motives*

The rational actor model typically assumes that individuals have certain preferences, they think about those preferences, and then choose a certain course of action by exercising their will.<sup>138</sup> The choice biases discussed above demonstrate that we do not “think” the way we think we think. The attitudes and motives discussed here demonstrate that we do not “prefer” the way we think we prefer. In other words, our reasoning is, among other things, motivated to justify existing social arrangements, to create coherent narratives for observed phenomena, and to simplify ambiguities. I discuss these in more detail below.

#### 1. System Justification Theory

John Jost and his co-authors have developed the idea of system justification theory to explain why individuals support and “prefer” the existing system, even when doing so appears

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<sup>134</sup> *Id.* at 655.

<sup>135</sup> *Id.* at 682.

<sup>136</sup> *Id.* at 655-56.

<sup>137</sup> *Id.* at 655.

<sup>138</sup> See, e.g., Hanson & Yosifon, *The Situational Character*, *supra* note 20, at 25-26.

to do more harm than good. Jost, Banaji and Nosek define the theory of system justification as “the process by which existing social arrangements are legitimized, even at the expense of [one’s] personal and group interest.”<sup>139</sup> In several of Jost’s articles on the subject, he and his co-authors explain how system justification theory prompts individuals to value the system they currently have, especially when the system appears unlikely to change.<sup>140</sup> System justification theory goes further than this, however, in that it motivates people not only to accept the current system, but to justify it. Jost and Hunyady explain, “System justification theory holds that people are motivated to justify and rationalize the way things are, so that existing social, economic, and political arrangements tend to be perceived as fair and legitimate.”<sup>141</sup> In other words, people not only accept the status quo—they come up with reasons why it is *right* that the world is as it is.

Jost and his colleagues give possible explanations as to why individuals practice system justification. For example, individuals may fear broad-based social change, preferring systems they know and understand.<sup>142</sup> “For many people, the devil they know seems less threatening and more legitimate than the devil they don’t.”<sup>143</sup> In cases where the system seems unlikely to change, individuals rationalize the system in order to convince themselves the system is fair, increasing “satisfaction with one’s situation.”<sup>144</sup>

While system justification theory may lead individuals to self-report a relatively high level of satisfaction with the system, Jost explains that such reasoning actually hampers systems from evolving in a more fair and inclusive direction. For example, if individuals rationalize the status quo, they are unlikely to change it and may continue to justify an often unfair system without exploring new possibilities.<sup>145</sup> Jost also describes the legal implications of system justification theories. For example, victims of abuse or discrimination might be

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<sup>139</sup> John Jost et al., *supra* note 106, at 883.

<sup>140</sup> *See, e.g., id.* at 887.

<sup>141</sup> John T. Jost & Orsolya Hunyady, *Antecedents and Consequences of System-Justifying Ideologies*, 14 CURRENT DIRECTIONS IN PSYCHOL. SCI. 260, 260 (2005).

<sup>142</sup> Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119, 1119-20 (2006).

<sup>143</sup> Jost & Hunyady, *supra* note 141, at 262.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 261.



unlikely to bring attention to their cause if doing so would threaten the status quo. More generally, Jost explains that the system justification theory “identifies important obstacles to social change in general, as well as to change in law and legal scholarship. Law, lawyers, and legal scholars need to take seriously the research on system justification motives and processes.”<sup>146</sup>

In a recent article, Blasi and Jost point out that the Supreme Court could point to only two instances in which it directly overturned an earlier precedent.<sup>147</sup> They hypothesize that this could be in part because “cognitive dissonance, implicit biases, and system justification motives affect judges, just like the rest of us.”<sup>148</sup> A broader version of this point is precisely the claim I make, and develop, in this Article.

## 2. Motive to Simplify

The motive to simplify and the motive to cohere provide another set of motivational factors prompting individuals to fall subject to a plethora of cognitive biases. Kunda explains that “we prefer those hypotheses that have greater *simplicity*, that is, require fewer additional hypotheses or assumptions to

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<sup>146</sup> Blasi & Jost, *supra* note 142, at 1120.

<sup>147</sup> *Id.* at 1165. Of course, the Supreme Court has overruled itself on more than these two cases (*Brown* overruling *Plessy* and *Lawrence* overruling *Bowers*). However, the point remains; the Court is generally loath to overrule prior cases. *See, e.g.,* *Indiana v. Edwards*, 128 S. Ct. 2379, 2388 (2008) (“Indiana has also asked us to overrule *Farretta*. We decline to do so.”); *Granholt v. Heald*, 544 U.S. 460, 488 (2005) (“Recognizing that *Bacchus* is fatal to their position, the States suggest it should be overruled or limited to its facts. As the foregoing analysis makes clear, we decline their invitation.”); *Thornton v. United States*, 541 U.S. 615, 624 n.4 (2004) (“Under these circumstances, it would be imprudent to overrule, for all intents and purposes, our established constitutional precedent, . . . and we decline to do so at this time.”). Moreover, the mere fact that no precedent supports a given position is itself a sort of argumentative “trump.” *See infra* Part IV.A.2.

It should also be noted that the Court only rarely grants certiorari to determine whether a case should be overruled. A simple WestLaw search (cert! /p grant! /50 “should be overruled” “should overrule”) returned only a handful of such instances in the past forty years. *See, e.g.,* *Pearson v. Callahan*, 128 S. Ct. 1702, 1702-03 (2008) (“In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: ‘Whether the Court’s decision in *Saucier v. Katz* should be overruled?’” (citation omitted)); *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 606 (1991) (“We granted certiorari to resolve a conflict among the Circuits as to the scope of the *Minturn* decision and to consider whether *Minturn* should be overruled.”); *Payne v. Tennessee*, 498 U.S. 1076, 1076 (1991) (“In addition to the questions presented by the petition, the parties are requested to brief and argue whether *Booth v. Maryland* and *South Carolina v. Gathers* should be overruled.” (citations omitted)).

<sup>148</sup> Blasi & Jost, *supra* note 142, at 1166.

account for the full range of evidence.”<sup>149</sup> Hanson and Yosifon further note that we prefer simple social theories and explanations to more complicated versions because our minds “operate under scarce capacity, cognitively, temporally, and conceptually.”<sup>150</sup> This motive to simplify, however, is often at odds with other motivations, such as the motive to be accurate, which requires more complex thought and explanation.<sup>151</sup> This becomes problematic for individuals since “this conflict between the motive for simplicity and the motive for accuracy may spill over and cause discord for our motive of self-affirmation.”<sup>152</sup>

### 3. Motive to Cohere

The motive to cohere explains why we are not comfortable with conflicting sets of motives, such as the combination of the motive to simplify with the motive to be accurate. “Because we value coherence, the desire to see it in ourselves dovetails with our motive for self-affirmation.”<sup>153</sup> Thagard explains that individuals strive to make sense of themselves and the outside world, and attempt to do so by “fitting something puzzling into a coherent pattern of mental representations that include concepts, beliefs, goals and actions.”<sup>154</sup> He further explains that “coherence can be understood in terms of maximal satisfaction of multiple constraints,” working together to form the most coherent story possible given the information available.<sup>155</sup> Hanson and Yosifon explain that on an individual level, we seek to make our current situation cohere with our personal desires.<sup>156</sup> In order to make our current situation more desirable, we compensate for a situation we dislike by physically gaining something (for example a monetary compensation), or else we alter our beliefs about that situation.<sup>157</sup> Think here of the young associate who hates his BigLaw job but justifies keeping the job on the basis of his large paycheck.

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<sup>149</sup> ZIVA KUNDA, SOCIAL COGNITION: MAKING SENSE OF PEOPLE 141 (1999).

<sup>150</sup> Hanson & Yosifon, *The Situational Character*, *supra* note 20, at 106.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 107.

<sup>154</sup> PAUL THAGARD, COHERENCE IN THOUGHT AND ACTION, at xi (2002).

<sup>155</sup> *Id.* at 17.

<sup>156</sup> Hanson & Yosifon, *The Situational Character*, *supra* note 20, at 108.

<sup>157</sup> *Id.*

On a group level, we seek coherence between our beliefs and the group's beliefs, but this motive often stems from pluralistic ignorance. For example, in the "Princeton drinking study," Prentice and Miller found that college student respondents mis-estimated their peers' attitudes toward alcohol consumption.<sup>158</sup> Then, in turn, they overestimated the gap between their peers' drinking and their own; they assumed their peers were drinking more than they actually were.<sup>159</sup> This is problematic when pluralistic ignorance influences behavior, prompting individuals to alter their perceptions (which might initially be correct) to fit what they misperceive are the perceptions of others in order to promote group coherence. Unfortunately, "[t]he problem of pluralistic ignorance and the motive for group coherence distorts many social norms and would seem to have significant implications for policy and law,"<sup>160</sup> as many decisions in these areas are made based on inaccurate assumptions.

C. *Stare Decisis is Cognitive Error*

Stare decisis—reasoning from precedent—requires adhering to a prior decision because it is the prior decision, not necessarily because it is correct. Frederick Schauer has explained that reasoning from precedent is commonplace in *all* forms of argument, not just legal argument.<sup>161</sup> When a younger child argues that he should be allowed to do something because his older sister was allowed to do so when she was the same age, the child is arguing based on precedent.<sup>162</sup> He is essentially saying, "You should follow the same rule in this case that you followed in the prior case."<sup>163</sup> The youngster expects the prior rule to apply in his case, regardless of whether the rule was correct then or is correct now.

However, taken together, the phenomena outlined above pose serious challenges to this mode of reasoning. First, the way we humans make choices strongly suggests that we are inclined to choose existing arrangements, not because they are

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<sup>158</sup> Deborah A. Prentice & Dale T. Miller, *Pluralistic Ignorance and the Perpetuation of Social Norms by Unwitting Actors*, in 28 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 161 (Mark P. Zanna ed., 1996).

<sup>159</sup> See *id.*

<sup>160</sup> Hanson & Yosifon, *The Situational Character*, *supra* note 20, at 115.

<sup>161</sup> Schauer, *Precedent*, *supra* note 7, at 572.

<sup>162</sup> See *id.*

<sup>163</sup> See *id.*

preferable but merely because they exist. Second, our brains are hard-wired in such a way that even the act of reasoning—something that is at the heart of every judicial opinion—is skewed toward viewing the existing set of legal rules as just, right, and natural.

In general, we (lawyers, judges, and citizens) are likely to overvalue existing legal entitlements because of the endowment effect. The Coase Theorem, which predicts that individuals will bargain around inefficient injunctions, turns out not to work in practice as it should in theory, in part because parties overvalue the injunction once it is in place.<sup>164</sup> Similarly, path dependence, the stickiness of default rules, and status quo bias suggest a cognitive predilection in favor of the way things are and have been. Thus, even judges with a good-faith interest in being alert to the possibility of inefficient or otherwise undesirable precedents may fail to see that they are perpetuating, rather than mitigating, the rules' effects.

This is illustrated by the phenomenon of information cascades. Eric Posner and Cass Sunstein have made a version of my argument in their 2006 article, *The Law of Other States*.<sup>165</sup> There, Posner and Sunstein develop a framework for analyzing when courts in one jurisdiction ought to treat as persuasive authority a rule laid down in a similar case in a foreign jurisdiction.<sup>166</sup> They note that the Condorcet Jury Theorem typically suggests that if many other relevant decision-makers have reached a particular result, then *this particular* decision-maker has reason to believe, with a relatively high probability, that the outcome is the correct one.<sup>167</sup> This rationale applies to courts' decisions too; if several courts reach a particular outcome, we might be more confident in the correctness of their result. But this conclusion requires each iterative decision to be independent, a criterion that is violated when cascades are present.

Earlier, I noted that the information cascade phenomenon is not irrational—a given judge, presuming that those who came before him had good information, has a high

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<sup>164</sup> See, e.g., Christine Jolls, Cass R. Sunstein & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, in *BEHAVIORAL LAW AND ECONOMICS* 13, 27-29 (Cass R. Sunstein, ed., 2000); see also Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *supra* note 110, at 1339-42 (1990).

<sup>165</sup> See Posner & Sunstein, *supra* note 21, at 160-64.

<sup>166</sup> *Id.* at 171-72.

<sup>167</sup> *Id.* at 131.

level of confidence that they are correct and rationally follows their lead.<sup>168</sup> However, as Vermeule points out, “[a] strategy that is individually rational for judges at any given time—following custom or tradition or precedent—is harmful to all if followed by all, because it drains custom or tradition or precedent of any epistemic value.”<sup>169</sup> At least to the Condorcetians and Burkeans, following tradition is more likely to lead to the correct answer. But if individuals are “withdrawing” from this bank of knowledge, but not contributing to it, then—by virtue of information cascades—we are all worse off.

Such is also the case with status quo bias and the endowment effect. Typically, we assume that judges will independently evaluate a case and make a decision based on the merits. If a particular legal rule is outmoded or otherwise unworkable, we hope that they will at least say so, even if they ultimately conclude that they are bound by the existing precedent. But status quo bias and the endowment effect suggest this will not happen. When given a pre-existing set of legal rules, judges will be hesitant to move away from the status quo (status quo bias) and will overvalue the intrinsic worth of the existing rules (endowment effect). Because they overvalue the benefits of the current rule, they will correspondingly overestimate the costs of *changing* that rule.<sup>170</sup>

This blends into the problem of sticky default rules. As Ben-Shahar and Pottow write in the context of contract law, parties tend to be unwilling to deviate from default rules for fear of being seen as manipulative or otherwise sneaky.<sup>171</sup> Similarly, a judge who deviates from the given rule might be seen as being “up to something,” or—*quelle horreur!*—an activist. Even if judges don’t have a sinister motive, the “stickiness” of default rules, in part because of the status quo bias, endowment effect, and so on, suggests that the judge will not deviate. Prentice and Koehler write about the “normality bias”—that actors are seen as more blameworthy when they take unusual actions than when they stick to the tried and true.<sup>172</sup> As a result, judges have a strong incentive not to deviate

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<sup>168</sup> See *supra* note 96 and accompanying text.

<sup>169</sup> Vermeule, *Many-Minds*, *supra* note 96, at 22.

<sup>170</sup> See, e.g., RUSSELL HARDIN, *COLLECTIVE ACTION* 82-83 (1982).

<sup>171</sup> See *supra* notes 130-133 and accompanying text.

<sup>172</sup> Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 CORNELL L. REV. 583, 583 (2003).

from tradition, because they would be seen as more blameworthy if their novel rule proved unworkable. The problem is compounded by the fact that we humans prefer sub-optimal situations to the risk of “getting it wrong” and the subsequent regret that might accompany choosing the non-default option. Thus, even if judges did not have an ulterior motive, and even if they were not concerned about being “blamed” for deviating, they *still* might not depart from the pre-existing rule, because they misperceive the risk of change and the costs of regret.

Framing effects and path dependence further entrench this problem. Recall that the framing effect suggests that the answer to a particular question often depends on how it is framed.<sup>173</sup> Of particular importance and relevance here, the framing effect is robust even among sophisticated respondents and even when respondents believe their answers will have an effect on policy choices.<sup>174</sup> And then, of course, as particular rules develop over time, path dependence suggests that they will get entrenched.<sup>175</sup> Pierson explains that path dependence is particularly likely to occur in the context of “formal, change-resistant institutions,” a description that certainly applies to the legal system.<sup>176</sup>

A recent article by Lindquist and Cross underscores this point.<sup>177</sup> The authors empirically tested the proposition that judges’ decisions reflect their policy preferences and are unconstrained by precedent.<sup>178</sup> They found that precedent does in fact constrain judges’ decision-making—but only in cases that are not of first impression.<sup>179</sup> In other words, once a decision is made in a case of first impression, that rule tends to stick.<sup>180</sup> Stare decisis is defended on the ground that it controls judges’ caprice. But Lindquist and Cross’s study suggests that it simply entrenches a tremendous first mover advantage.

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<sup>173</sup> See *supra* Part III.A.4.

<sup>174</sup> See Gonzalez et al., *supra* note 113, at 2; Kahneman & Tversky, *supra* note 116, at 343.

<sup>175</sup> See *supra* Part III.A.5.

<sup>176</sup> Pierson, *supra* note 119, at 252.

<sup>177</sup> Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin’s Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156 (2005).

<sup>178</sup> *Id.* at 1158-59.

<sup>179</sup> *Id.* at 1205-06.

<sup>180</sup> *Id.* at 1183-84. I explore how a decision made in a case of first impression “sticks” in my discussion of Sarbanes-Oxley, *infra* Part IV.A.1.

Most noteworthy is that these biases often operate in tandem. Consider a legal question to which a reasonable person might answer X or Y. First-order path dependence teaches that, if both outcomes are roughly equally reasonable, there is no way to predict what a given court will do.<sup>181</sup> However, if just one court chooses Y, information cascades suggest that (at least under certain circumstances), more and more people will start choosing Y. Over time, it might become apparent that X was the better option. But second-order path dependence predicts that we will be unlikely to choose X.<sup>182</sup> This prediction is reinforced by status quo bias and the stickiness of default rules: given a particular legal entitlement (“Y”), we will be highly reluctant to move away from it.<sup>183</sup> We might even imagine that some judges, in good faith, evaluate X and Y and weight the benefits of the correct rule against the costs of change. However, the endowment effect suggests that even these well-intentioned judges will overestimate the benefit of sticking with Y and overestimate, as a result, the cost of moving to X.

Our choice biases also interact with our attitudes and motives. This is perhaps most vividly illustrated by the intersection of system justification theory and status quo bias: we start out predisposed to “preferring” the status quo, and once we get accustomed to the status quo, we imbue it with a sense of legitimacy. In this telling, we are even *less* likely to move from Y to X, because, in addition to the incorrect assessment of cost and benefit, we are subconsciously primed to believe that X—merely by virtue of being different—is unjust and unfair. Similarly, the motive to cohere and the motive to simplify predict that, when an array of fact patterns come up over time, judges are more likely to recast a given case in terms of pre-existing precedent (“Y”), because doing so is simpler and creates a coherent narrative.

If these cognitive biases have explanatory power, then we might find ourselves in quite a bit of trouble. Under the current system, lower courts are supposed to take precedent at face value until altered. Moreover, *stare decisis* applies not only to courts’ holdings but also their ratios decidendi—the reasons for their decisions. But if judges (being, as they are,

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<sup>181</sup> See *supra* Part III.A.5.

<sup>182</sup> See *supra* Part III.A.5.

<sup>183</sup> See *supra* Part III.A.6.

human) are using cognitive shortcuts, and if these shortcuts are all skewing in the same direction, then we should be suspicious of judges' decisions and their stated reasons for them.

About a decade ago, Eric Talley explored a partial version of my hypothesis: he analyzed whether legal doctrine could be explained as being the result of information cascades. In setting up this inquiry, he wrote,

If common law precedent is in fact a type of [information] cascade, it would represent the strongest refutation yet of the common law efficiency hypothesis. Indeed, it would suggest that *even if* judges are predisposed towards efficiency, and *even if* they do not face a biased selection of cases, precedents might still frequently diverge from the most efficient legal rule. Moreover, a theory of precedential herding would force us to rethink the coherence of virtually *any* jurisprudential theory of precedent that conceives of the common law as a mechanism for judicial learning—be it economic or otherwise. *If precedent represents a weak or impoverished learning device, then a common law system of adjudication seems unlikely to produce reliable results.*<sup>184</sup>

Thus far, the focus has been on courts' use of stare decisis essentially as a heuristic, one that might be leading to suboptimal results, but in any event one whose epistemic basis has been called into question. But there is another sense in which adherence to precedent can be problematic. The psychological phenomena catalogued do not only suggest that stare decisis might be an unreliable guidepost for judicial decision-making. They also suggest that adherence to precedent may be serving as a "shield" for unjust or otherwise undesirable results. Consider that the normality bias suggests that decision-makers will be reluctant to deviate from the norm: even if precedent has entrenched a rule that is unfair to certain groups of people, a judge might feel that ruling against that group makes her complicit in this injustice. But stare decisis provides the necessary cover: "I'd like to help you, but I'm bound by precedent to rule against you."<sup>185</sup> As Hanson and

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<sup>184</sup> Talley, *supra* note 82, at 91 (emphasis added). Talley ultimately concludes that precedent cannot be fully explained by cascades, though he suggests that a more complete story (that explains precedent in terms of biases beyond just cascades) might be correct. *See id.* at 121-24. I respond to this point at the end of the Article. *See infra* notes 376-382 and accompanying text.

<sup>185</sup> *See, e.g.,* Westlake Vinyls v. Goodrich Corp., No. 5:03-CV-00240-R, 2007 WL 1959168, at \*3-4 (W.D. Ky. June 29, 2007) ("This court shares its sister district courts' 'latent misgivings' about the propriety of the rule announced in *Goodyear*, but like those courts, is bound to apply governing Sixth Circuit precedent."); United States



Benforado have noted, the actor-observer bias tends to make us blame the person when another person does something “bad” (what a rotten judge!) but to blame the situation when we do something bad (how could I be expected to defy precedent?).<sup>186</sup> And so our biases and attributional proclivities suggest not only that stare decisis might not be furthering the goals we think it is but also that the system itself may be providing “cover” to judges who render decisions they know may be perceived as unjust.

Well, that’s the payoff. The correlated cognitive, psychological, and situational phenomena I have outlined in this Part, operating in tandem, strongly undercut the typical arguments for stare decisis. We think that the received legal rules are desirable (why would we have come to these decisions if they were not?). But “survival does not imply present-day superiority to untried alternatives.”<sup>187</sup> In the balance of this Article, I evaluate what implications this might have for law, respond to some criticisms of my argument, and imagine what a (jurisprudential) world might look like if stare decisis did not have the weight it does today.

#### IV. SOME PREDICTIONS AND IMPLICATIONS FOR LAW AND LEGAL THEORY

##### A. *Predicting Bias*

At this point, it is worth pausing and asking whether this theoretical argument has practical significance. Are there instances where reliance on stare decisis has produced “skewed” results? In one sense, the question is difficult to answer. For example, since *Hadley v. Baxendale*, a party who breaches a contract is only liable for reasonably foreseeable damages, not proximately caused damages.<sup>188</sup> The practice of stare decisis has entrenched this rule in our system, and it may

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v. Pantoja, No. CR-05-164-FVS, 2006 WL 151939, at \*2 (E.D. Wash. Jan. 19, 2006) (noting that a recent Supreme Court case arguably supported the defendant’s position, but that the district court was bound by Ninth Circuit precedent); Barclay v. Spitzer, 371 F. Supp. 2d 273, 274-75 (E.D.N.Y. 2005) (noting, in the context of ineffective assistance of counsel, that the New York State rule “seems more useful” than the federal rule, but explaining that Second Circuit precedent binds it to use the latter).

<sup>186</sup> Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311, 322 n.26 (2008).

<sup>187</sup> Roe, *supra* note 125, at 644.

<sup>188</sup> (1854) 9 Exch. 341, 342.

or may not be preferable to the alternatives. However, even among critics of *Hadley's* rule,<sup>189</sup> it would be hard to find some unanimity as to *why Hadley* was wrong, and harder still to determine if information cascades and status quo bias entrenched the rule, as opposed to a good faith belief among generations of judges that such a rule was preferable.

However, it is possible to find at least circumstantial evidence of stare decisis producing results that are, if not skewed, at least somewhat suspect. Assume that a court at time  $t$  decides that, under certain circumstances, the correct legal rule is X. Assume further that at time  $t+n_1$ , another court also holds X. Then, at  $t+n_2$ , a third court holds X; at  $t+n_3$ , a fourth court holds X. These courts might be reaching the same result because they believe the first rule was correct, or because doing so leads to stability, or to preserve judicial legitimacy. However, the entrenchment of the legal rule may also be due to heuristic judgments by the subsequent courts.

There are several factors that could suggest that a subsequent court is following the first court's holding because it is relying on stare decisis as a heuristic, rather than as a means to preserve certain ostensibly desirable goals. I predict that when the subsequent court's decision reflects a heuristic judgment, the decision is likely to have one or more of several characteristics:

1. The subsequent court relies on the first court, even though the first court's decision is not binding on it.
2. The subsequent court engages in relatively little legal analysis of the issue, whereas the first court engaged in extensive analysis.
3. When there is ambiguity in the law, the subsequent court resolves the ambiguity in such a way that supports the decision of the first court.
4. The subsequent court—when the number of cases following the first court is relatively high—justifies its decision with reference to the large number of courts that have already decided X.
5. The subsequent court relies relatively more on policy considerations or generalized principles of law, rather than more detailed textual or doctrinal analysis.

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<sup>189</sup> See, e.g., Symposium, *The Common Law of Contracts as a World Force in Two Ages of Revolution: A Conference Celebrating the 150th Anniversary of Hadley v. Baxendale*, 11 TEX. WESLEYAN L. REV. 225 (2005).

When a rule of law is unsettled or still developing, I predict that several of these factors would be present in the decisions of the various *subsequent* courts, providing strong circumstantial evidence that the subsequent courts are using stare decisis as a crutch, rather than as a mode of legal reasoning that supports desirable outcomes. Of course, the list of factors is not exhaustive and the phenomenon is not limited to unsettled law. For example, when the rule of law has been settled for a relatively long period of time, the subsequent court might emphasize the destabilizing or disruptive impact that a deviation from the received rule would have.

Although the list above is not intended to be exhaustive, the factors set out above are derived from the behavioral data catalogued in Part III. For example, in the music downloads study,<sup>190</sup> songs were downloaded more often (the “subsequent court,” to use the construction above) when they were shown to be popular on a list of top downloads. If a similar phenomenon applied to judicial decision-making, I would predict that a certain rule of law would become more entrenched when it was shown to be the popular rule in other courts. Just as the Southern District of New York is not obligated to follow the rule of decision in the Eastern District of Pennsylvania, someone downloading music in Lowenstein’s study was not obligated to download the popular song.<sup>191</sup> Following a trend when it is not obligatory provides strong circumstantial evidence of information cascades.

Along similar lines, system justification theory suggests that judicial decisions are entrenched because we want to believe that a legal system is fair and just. Subsequent courts might be inclined to follow earlier cases by telling the challenger that the status quo rule (made by the first court) is the fairer and more just rule. Similarly, our motives to simplify and cohere suggest that courts will be hostile to those who challenge the precedential rule, because change is potentially disruptive. Particularly in the face of ambiguity, these phenomena suggest that our reasoning is motivated to create simple and coherent narratives out of the facts before us, which in turn suggests that courts will resolve ambiguity in favor of the precedential rule. Risk aversion—and the tendency of

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<sup>190</sup> See *supra* notes 93-95 and accompanying text.

<sup>191</sup> See *supra* notes 93-95 and accompanying text.

courts (and others) to overestimate the costs of change—further escalates this problem.

According to the case law, lower courts are obligated to accept binding precedent at face value until altered. But the cognitive and situational phenomena canvassed above suggest that we humans will generally rely on “precedent”—that is, we will defer to, and overvalue, existing rules and arrangements—regardless of the doctrinal edicts that compel a judge to do so in a particular case. Courts will rely on precedent, even when they are not obligated to, as a cognitive shortcut, pushing the law in directions that might be incorrect or otherwise socially undesirable.

### 1. Testing the Prediction I: Section 304 of Sarbanes-Oxley

In 2002, Congress enacted the Sarbanes-Oxley Act in response to the corporate scandals of the day.<sup>192</sup> Among other things, the law provided for so-called “clawbacks.” Under this provision, in section 304 of the law,<sup>193</sup> a company would be able to recover certain compensation paid to its executives if malfeasance was later revealed.<sup>194</sup> Specifically, the law provided that if an issuer filed a restatement because of misconduct resulting in “material noncompliance” with financial reporting requirements, then the company’s CEO and CFO would be required to reimburse the issuer for (1) bonuses and other compensation received in the twelve months following the first filing of financials subject to a restatement; and (2) any profits derived from the sale of the issuer’s securities during those twelve months.<sup>195</sup>

However, section 304 did not specify who had the right to enforce the provision. Some sections explicitly gave a company’s shareholders the right to enforce the statutory provision in question;<sup>196</sup> other sections explicitly reserved enforcement authority in the Securities and Exchange

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<sup>192</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15, 18, and 28 U.S.C.).

<sup>193</sup> Sarbanes-Oxley Act § 304, 15 U.S.C. § 7243 (2006).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *See, e.g.*, Sarbanes-Oxley Act § 306, 15 U.S.C. § 7244 (explicitly affording a private right of action in the insider trading context).

Commission.<sup>197</sup> Section 304 did neither. It was a classic “gray area.” Predictably, in the years since SOX was enacted, section 304 has been the subject of many shareholder derivative suits. The shareholder plaintiffs have argued that section 304 creates an implied private right of action in their favor, and the companies have argued that it does not.<sup>198</sup>

Eventually, the courts spoke on the question.<sup>199</sup> The first case to squarely address this issue was *Neer v. Pelino*, a 2005 case from the Eastern District of Pennsylvania.<sup>200</sup> *Neer* recognized that when a statute is unclear as to whether there is a private right of action, courts must conduct a four-step analysis, as the Supreme Court instructed in *Cort v. Ash*.<sup>201</sup> Therefore, *Neer* analyzed the four “*Cort* factors” to determine whether there was a private right of action under section 304. The court examined the statutory text of section 304, the legislative history of Sarbanes-Oxley, and the relation of section 304 to other provisions in the statute.<sup>202</sup> *Neer* ultimately concluded that there was no private right of action under section 304 and dismissed that count of plaintiffs’ complaint for failure to state a claim.<sup>203</sup>

So far, so good. But statutory analysis, it turns out, has a lot in common with music downloads. Recall that in the study by Salganik et al., songs would get downloaded more often if the consumers were told that those songs were popular.<sup>204</sup>

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<sup>197</sup> See, e.g., Sarbanes-Oxley Act § 303, 15 U.S.C. § 7242 (explicitly giving the SEC exclusive enforcement authority).

<sup>198</sup> These were the litigants’ positions in all of the cases cited in this Part.

<sup>199</sup> My case study focuses on the district courts to address this question. As of this date, only one circuit court has squarely addressed the issue. See *In re Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1226 (9th Cir. 2008) (“[T]here is no private right of action under section 304.”). Another case addresses the issue, but does so briefly with little discussion. See *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Raines*, 534 F.3d 779, 793 (D.C. Cir. 2008) (holding that section 304 “does not create a private right of action”). I discuss the district court’s ruling in *Digimarc* in this Part. However, for my purposes, it is not particularly relevant that the Ninth Circuit has spoken to this issue. My overall thesis explores the development of this line of case law at the district courts and, for the three-plus years between *Neer* and the Ninth Circuit’s decision, *Neer* was the first district court case. In fact, *Neer* has not been cited and *Digimarc* has been cited only three times in a reported case in the ten months since *Digimarc*, suggesting that the issue is sufficiently resolved at this point as to not necessitate further litigation. This underscores how the phenomena catalogued here can be problematic for the development of the law, even when the pattern develops only among district courts.

<sup>200</sup> 389 F. Supp. 2d 648 (E.D. Pa. 2005).

<sup>201</sup> *Id.* at 652-53; see also *Cort v. Ash*, 422 U.S. 66 (1975).

<sup>202</sup> 389 F. Supp. at 653-57.

<sup>203</sup> *Id.* at 657-58.

<sup>204</sup> See *supra* notes 93-95 and accompanying text.

Information cascades are well-documented in other contexts. What about in the law? The section 304 example shows federal district courts across the country essentially following the rule set forth in *Neer*, with little to no legal analysis of their own. Over time, the *Neer* rule has become reinforced in the case law, with subsequent courts referring to the large number of prior courts that have reached the same conclusion as *Neer*. The courts are following the leader, even though *Neer* is binding on none of these courts. Although the subsequent cases tend to recognize the statutory ambiguity, they uniformly resolve the ambiguity in a way that supports *Neer*. As a result, every subsequent case meets characteristics (1) and (3) above. I discuss the post-*Neer* cases below.

*Neer*'s analysis spanned seven pages in the official reporter.<sup>205</sup> Since *Neer*, cases have resolved the issue in just a few paragraphs, or sometimes just a sentence or two. The next major case after *Neer*, *In re BISYS Group, Inc. Derivative Action*, disposed of the issue in just two paragraphs with no substantive legal analysis.<sup>206</sup> Instead, the court summarily held:

[T]here is no private right of action under Section 304 of Sarbanes-Oxley, substantially for the reasons stated in *Neer*. The question whether creation of a private right of action under Section 304 might have been a good idea is for Congress, which alone is charged with making the close judgments and sometimes messy compromises inherent in the legislative process.<sup>207</sup>

Thus, *BISYS* reflects factors (2) and (5) above: relatively little legal analysis of the issue, and a reliance on policy justifications in lieu of textual or doctrinal analysis.<sup>208</sup>

In *In re Whitehall Jewellers, Inc. Shareholder Derivative Litigation*, the court laid out the *Cort* factors and discussed the

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<sup>205</sup> *Neer*, 389 F. Supp. 2d at 651-57.

<sup>206</sup> *In re BISYS Group, Inc. Derivative Action*, 396 F. Supp. 2d 463, 464 (S.D.N.Y. 2005).

<sup>207</sup> *Id.* at 464.

<sup>208</sup> The court's comment that the issue is one for Congress is peculiar, because the *Supreme Court* has indicated that courts may imply private rights of action under certain circumstances. See *Cort v. Ash*, 422 U.S. 66, 78 (1975). Judge Kaplan might (correctly) believe that the current Court disfavors implied rights of action and that he should therefore disregard *Cort*. However, "[i]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson*, 490 U.S. 477, 484 (1989) (emphasis added).

issue more extensively than in *BISYS*.<sup>209</sup> However, *Whitehall* also demonstrates the beginnings of an information cascade regarding section 304. First, the court wrote that it “is inclined to concur with its colleagues in *Neer* and *Bisys Group* that no private right of action is available under § 304 . . . .”<sup>210</sup> Second, although the court laid out the applicable doctrinal analysis, at every juncture, it simply deferred to *Neer* or *BISYS*.<sup>211</sup> *Whitehall* thus reflects at least factor (2), and to a lesser extent (4)—reference to the number of courts that have already reached a particular decision.<sup>212</sup>

*Kogan v. Robinson*, about eight months after *Neer*, engaged in the most extensive analysis of any post-*Neer* case.<sup>213</sup> However, even here, the legal analysis relies on *Neer* at every turn.<sup>214</sup> Additionally, the court refers to the fact that “all other courts that have considered this issue[] . . . conclude[d] [that] Section 304 does not explicitly create a private remedy.”<sup>215</sup> And when plaintiffs cited a Ninth Circuit case implying a right of action in favor of shareholders, the court declined to follow it, in part on policy grounds.<sup>216</sup> *Kogan* noted that courts were more likely to imply rights of action in the past.<sup>217</sup> Because implied rights of action are disfavored today, *Kogan* found the earlier Ninth Circuit case distinguishable.<sup>218</sup> Thus, despite its relatively extensive analysis, *Kogan* reflects factors (4) and (5).

The result was the same in *In re Digimarc Corp. Derivative Litigation*.<sup>219</sup> The court noted plaintiffs’ argument “that Section 304’s text, [SOX’s] statutory construction and legislative history, and the purpose underlying Section 304 all favor finding the existence of an implied private right of

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<sup>209</sup> *In re Whitehall Jewellers, Inc. S’holder Derivative Litig.*, No. 05 C 1050, 2006 WL 468012, at \*7-8 (N.D. Ill. Feb. 27, 2006).

<sup>210</sup> *Id.* at \*8.

<sup>211</sup> *See id.* at \*7-8 & n.13 (“this court, too, agrees with *Neer*,” “[t]he *Neer* court reached its conclusion,” “[t]he *Neer* court observed,” “[t]he *Bisys Group* court pointed out that”).

<sup>212</sup> *Id.* at \*7 (noting that no court has “recognized an implied private right of action”).

<sup>213</sup> *Kogan v. Robinson*, 432 F. Supp. 2d 1075, 1078-82 (S.D. Cal. 2006).

<sup>214</sup> *See id.* at 1079 (citing *Neer* twice); *id.* (“[a]s stated in *Neer*”); *id.* at 1082 (citing *Neer*).

<sup>215</sup> *Id.* at 1078.

<sup>216</sup> *Id.* at 1080.

<sup>217</sup> *Id.*

<sup>218</sup> *See id.*

<sup>219</sup> *In re Digimarc Corp. Derivative Litig.*, No. 05-1324-HA (LEAD), 2006 WL 2345497 (D. Or. Aug. 11, 2006), *aff’d in part and rev’d in part*, 549 F.3d 1223 (9th Cir. 2008).

action.”<sup>220</sup> The court responded with little legal analysis, writing instead, “Every court that has considered the issue directly has concluded that Section 304 contains no implied private right of action.”<sup>221</sup> *Digimarc* reflects factors (2) and (4).

The court in *In re Goodyear Tire & Rubber Co. Derivative Litigation* disposed of the section 304 issue in just two paragraphs.<sup>222</sup> Like its predecessors, the court relied on *Neer*: “The Court is persuaded by the well-reasoned decision in *Neer v. Pelino*.”<sup>223</sup> *Goodyear* acknowledged that there was no binding precedent on the issue.<sup>224</sup> Therefore, it concluded, “this Court is free to consider [*Neer*, *Whitehall*, *Kogan*, and *Digimarc*] as persuasive authority on which it bases its decision.”<sup>225</sup> Of course, one might think that, “[i]n the absence of binding authority,”<sup>226</sup> it is *more* important for a district court to analyze the legal claims anew, if only to provide a fuller presentation of the legal issues for appeal. The court’s failure to engage in such analysis underscores factor (1), and also reflects factors (2) and (4).

In *Pedroli ex rel. Microtune Inc. v. Bartek*, the court declined to imply a private right of action, pointing out that the plaintiff was “ignoring the predominant holdings across the country that the Act does not create a private cause of action under § 304 . . . .”<sup>227</sup> The court disposed of the issue in just two paragraphs, concluding, “The court declines to address the issue in any more detail and believes that the cases cited conclusively mandate a dismissal of [the section 304] Count . . . .”<sup>228</sup> *Pedroli* also demonstrates numbers (2) and (4).

*In re Infosonics Corp. Derivative Litigation* reflects factor (2) and especially (3).<sup>229</sup> First, the court deferred to *Neer* and *Kogan*, addressing the issue in just two paragraphs.<sup>230</sup>

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<sup>220</sup> *Id.* at \*2.

<sup>221</sup> *Id.*

<sup>222</sup> *In re Goodyear Tire & Rubber Co. Derivative Litig.*, Nos. 5:03CV2180, 5:03CV2204, 5:03CV2374, 5:03CV2468, 5:03CV2469, 2007 WL 43557, at \*7-8 (N.D. Ohio Jan. 5, 2007).

<sup>223</sup> *Id.* at \*7.

<sup>224</sup> *See id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Pedroli ex rel. Microtune, Inc. v. Bartek*, 564 F. Supp. 2d. 683, 686 (E.D. Tex. 2008) (citing *Neer*, *BISYS*, *Kogan*, *Whitehall*, and *Digimarc*).

<sup>228</sup> *Id.*

<sup>229</sup> *In re Infosonics Corp. Derivative Litig.*, No. 06cv1336 BTM(WMc), 2007 WL 2572276, at \*8-9 (S.D. Cal. Sept. 4, 2007).

<sup>230</sup> *Id.*



Second, it noted that Congress could have been explicit about creating a private right, just as it was in section 306.<sup>231</sup> Of course, it is just as true that if Congress wanted to *foreclose* a private right, it could have done so explicitly, just as it did in section 303.<sup>232</sup> The court thus resolved the statute's ambiguity in favor of the earlier, non-binding cases.<sup>233</sup> This underscores factor (3).

The *In re Diebold Derivative Litigation* case disposed of the section 304 claim in just one paragraph, with no legal reasoning at all, writing:

Every court that has considered whether SOX § 304 provides a private right of action has answered that question in the negative [citing *Neer*, *BISYS*, *Kogan*, and *Goodyear*]. Th[is] [c]ourt agrees, and finds that SOX § 304 does not create an implied private right of action.<sup>234</sup>

Unsurprisingly, *Diebold* reflects factors (2) and (4) above. However, it is interesting to note that *Diebold*, decided in 2008, gave no special weight to *Goodyear*, decided in 2007 by the same court. In theory, horizontal stare decisis requires a court to adhere to its prior decisions.<sup>235</sup> Therefore, *Diebold* could have disposed of the issue by writing, “Until and unless the Sixth Circuit instructs otherwise, this court is obligated to follow its prior decisions. Accordingly, there is no private right of action under section 304, as stated in *Goodyear*.” The fact that *Diebold* gives no special weight to *Goodyear* (mentioning it only at the end of a string-cite)<sup>236</sup> gives additional support for the conclusion that *Diebold*'s conclusion is based on a heuristic judgment, rather than bona fide legal analysis.

The court in *In re iBasis, Inc. Derivative Litigation* recognized the tension between sections 303, 304, and 306.<sup>237</sup> But that court also deferred to “all other courts that have had the occasion to address the issue directly” and “found that Congress did not create a private right of action for purposes of

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<sup>231</sup> *Id.*

<sup>232</sup> Sarbanes-Oxley Act § 303, 15 U.S.C. § 7242 (2006).

<sup>233</sup> *In re Infosonics*, 2007 WL 2572276, at \*9.

<sup>234</sup> *In re Diebold Derivative Litig.*, Nos. 5:06CV0233, 5:06CV0418, 2008 WL 564824, at \*2 (N.D. Ohio Feb. 29, 2008) (citations to *Neer*, *BISYS*, *Kogan*, and *Goodyear* omitted).

<sup>235</sup> *See, e.g.*, Nash & Pardo, *supra* note 19, at 1750-51.

<sup>236</sup> *In re Diebold*, 2008 WL 564834, at \*2.

<sup>237</sup> *In re iBasis, Inc. Derivative Litig.*, 532 F. Supp. 2d 214, 224 (D. Mass. 2007).

enforcing section 304 of SOX.”<sup>238</sup> The court went on to cite *Goodyear*, *Digimarc*, *Kogan*, *Whitehall*, *BISYS*, and *Neer* and was “persuaded by . . . precedent from other courts that have *directly and thoughtfully considered the issue*.”<sup>239</sup>

The *iBasis* decision is interesting on two levels. First, it reflects factors (2) and (4). However, it goes further. *iBasis* not only cites the cases above but also credits the “direct[] and thoughtful[] consideration” those cases gave to “the issue” of whether SOX § 304 contains an implied private right of action.<sup>240</sup> This reference is striking because, as discussed above, almost *none* of the cited cases engage in “direct[] and thoughtful[] consideration”<sup>241</sup> of the issue. Instead, most of the cases discuss the issue briefly, with little or no legal analysis, deferring almost categorically to *Neer*.

At this point, it is worth reiterating Posner and Sunstein’s argument:

If two states have adopted a law, or if two state courts have made some innovation, a third may do so, not because of any kind of independent judgment, but because it is following its predecessors. And if three states have made the same decision, a cascade might be forming. The problem is that subsequent states might assume that decisions have been made independently, even though most have been following the crowd.<sup>242</sup>

The cases discussed in the section 304 example demonstrate, to varying degrees, all of the features that I predict would be present when later courts are following an earlier court out of cognitive bias. The case study provides strong support for the hypothesis that, at least sometimes, courts defer to prior decisions because doing so is quick and easy—not because doing so leads to the best results.<sup>243</sup>

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<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 225 (emphasis added).

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> Posner & Sunstein, *supra* note 165, at 32.

<sup>243</sup> Two interesting questions arise. First, would every single case have come out the opposite way if *Neer* had come out the other way? Second, if the first circuit court had held that there *is* a private right of action, would *district* courts in other circuits have followed it, or the “weight of authority” among the majority of district courts? The second is an open question. However, for reasons that are beyond the scope of this Article, the behavioral literature suggests that other courts might not have followed *Neer* in my counterfactual, because of the strong situational pressures that drive corporate law to generally favor managers over shareholders, especially in derivative suits. See Chen & Hanson, *supra* note 27, at 59-64.

## 2. Testing the Prediction II: The First and Fourth Amendments

In one sense, heuristic judgments should be less common at the Supreme Court. The court has the luxury of deciding which cases it will hear, so it can manage its resources in a way that other courts cannot. If heuristics are a way of dealing with scarce cognitive (judicial) resources, then we should expect to find such biases less prevalent when resources are greater. Similarly, Supreme Court Justices (and law clerks) may, aware of the importance of their work, be especially careful not to take shortcuts, cognitive or otherwise.

But at the same time, other considerations suggest that the Supreme Court might be *more* prone to biases and heuristics. First, the Court is final; it is bound by no other court, as reflected in Justice Jackson's famous quote, "We are not final because we are infallible, but we are infallible only because we are final."<sup>244</sup> A lower court might rationalize its reliance on precedent on the basis of the doctrinal rules that obligate it to reach a particular result. The Supreme Court, answerable (at least formally) to no institution but itself, might actually be more susceptible to bias because it is not bound by any sort of frequent check.

Second, as Richard Posner points out, at least in constitutional cases, the Supreme Court is not bound by *any* "law" at all. Posner writes,

The Supreme Court, when it is deciding constitutional cases, is political in the sense of having and exercising discretionary power as capacious as a legislature's. It cannot abdicate that power, for there is nothing on which to draw to decide constitutional cases of any novelty other than discretionary judgment. To such cases the constitutional text and history, and the pronouncements in past opinions, do not speak clearly. Such cases occupy a broad open area where the conventional legal materials of decision run out and the Justices, deprived of those crutches, have to make a discretionary call.

Constitutional cases in the open area are aptly regarded as "political" because the Constitution is about politics and because cases in the open area are not susceptible of confident evaluation on the basis of professional legal norms. They can be decided only on

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<sup>244</sup> Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

the basis of a political judgment, and a political judgment cannot be called right or wrong by reference to legal norms.<sup>245</sup>

My assertion here is not that the Supreme Court's position of finality renders it incapable of making "bias-free" judgments. I am making a different point: although the Court's position situates it different from the lower courts, it is still susceptible to heuristics and biases.

The evolution of three lines of Supreme Court precedent, in the context of the First and Fourth Amendments, demonstrates such judgments. In a recent series of articles, Anuj Desai explains how certain First and Fourth Amendment *constitutional* doctrines can only be properly understood with the *statutory* history of the United States Postal Service in mind. When early Post Office cases came to the Court, they were properly decided with reference to the statutes that Congress had enacted governing the Post Office. However, those cases implicated broader policy issues regarding free expression and privacy. Later, when constitutional questions implicating free expression and privacy arose, the Supreme Court followed its earlier Post Office decisions—even though those decisions were based on the unique institutional context of the Post Office and were not squarely on all fours with the constitutional cases. The Constitution makes no mention of a First Amendment "right to receive" ideas,<sup>246</sup> and it does not restrict government subsidies in connections with the mail.<sup>247</sup> And the Fourth Amendment does not specify that correspondence between persons is subject to a right to privacy.<sup>248</sup> Yet these (judge-made) doctrines exist today—and they all have their origins in Post Office policy.

Professor Desai outlines the process by which constitutional law can follow legislative choices thusly: "(1) Congress passes a statute; (2) the statutory provision gives an institution certain attributes; (3) over time, social practice embeds those attributes into the institution; and (4) the courts

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<sup>245</sup> Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 40 (2005).

<sup>246</sup> Anuj Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671, 674 (2007) [hereinafter Desai, *Transformation*].

<sup>247</sup> Anuj Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 STAN. L. REV. 553, 556-58 (2007) [hereinafter Desai, *Wiretapping*].

<sup>248</sup> *Id.* at 556-58.

then take those attributes and write them into constitutional law.”<sup>249</sup>

Desai chronicles how this process manifested itself in connection with the Post Office. First, the legislature embedded certain republican principles (a right to privacy in the mails, a right to receive ideas) into the institution.<sup>250</sup> Over the years, these principles became ingrained into societal expectations about how the Post Office should operate. Eventually, the Supreme Court held that these principles were constitutionally required.<sup>251</sup> The Supreme Court effectively raised Post Office statutes to the level of Constitutional law.

This kind of evolution supports my thesis. The Supreme Court elevates Post Office policy to constitutional law, not because of some strong consensus that the Post Office statute from 1792 reflects our understanding of the Fourth Amendment, but because it is following precedent, trying to minimize doctrinal conflicts, and relying on case law even though it arose in a distinct context. The Court’s reliance on *stare decisis* is, at least in part, the reflection of heuristics and biases. Over the next several pages, I summarize two of Desai’s articles, showing how this evolution took place. I then explain in some more detail how this story supports my thesis.

This story starts in the 1770s, when revolution was brewing in the colonies. The existing British postal system had no notion of privacy of correspondence. Indeed, the British government regularly opened citizens’ mail in order to gather intelligence on “conspiracies.”<sup>252</sup> Though it was officially illegal to open mail without a warrant, warrants were issued secretly and could often contain hundreds of names.<sup>253</sup> As one historian stated, “secrecy made legality unimportant.”<sup>254</sup>

Not only was confidentiality of the mail compromised, those who controlled the postal networks could also control what was allowed through the networks. Postmasters would exploit their position to block competing newspaper publishers from using the postal service.<sup>255</sup> As tensions rose between the

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<sup>249</sup> *Id.* at 557.

<sup>250</sup> *See id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 561.

<sup>253</sup> *Id.* at 560.

<sup>254</sup> *Id.* at 561 (internal quotation marks omitted) (quoting KENNETH ELLIS, *THE POST OFFICE IN THE EIGHTEENTH CENTURY: A STUDY IN ADMINISTRATIVE HISTORY* 63 (1958)).

<sup>255</sup> Desai, *Transformation*, *supra* note 246, at 679.

British and the colonists, the nature of this blocking became political.<sup>256</sup>

This regular opening of private correspondence posed a special problem for American rebels, who had to ensure privacy of correspondence to carry on their plans for the Revolution. Further, their inability to use the postal service to distribute their newspapers discouraged the American rebels from communicating their ideas to a larger audience. In response, they adopted an alternate mail system, the “constitutional post,” established by William Goddard, a Philadelphia newspaperman.<sup>257</sup> Goddard realized the importance of the postal network for securely transmitting private information as well as for transmitting news and ideas to the populace. In his proposal to establish the “constitutional post,” he wrote, “It is not only our letters that are liable to be stopped and opened by a ministerial mandate, and their contents construed into treasonable conspiracies, but our newspapers, those necessary and important alarms in time of publick danger, may be rendered of little consequence for want of circulation.”<sup>258</sup> His goals coincided with those of the American revolutionaries—freedom to express ideas without fear of being accused of treason.<sup>259</sup>

In 1782, the Continental Congress passed a postal ordinance that codified this desire for freedom of correspondence.<sup>260</sup> The ordinance prohibited postal officials from opening the mail without “an express warrant.”<sup>261</sup> The ordinance also called for “moderate rates” for the mailing of newspapers.<sup>262</sup> After the ratification of the Constitution, Congress passed the Post Office Act of 1792.<sup>263</sup> The Act contained a similar provision for privacy of correspondence, which passed without controversy or even much discussion.<sup>264</sup> However, debate arose around two issues involving newspapers. One issue revolved around whether to allow all newspapers to be circulated or whether to selectively admit

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<sup>256</sup> *Id.* at 680.

<sup>257</sup> Desai, *Wiretapping*, *supra* note 247, at 564 (internal quotation marks omitted).

<sup>258</sup> *Id.* (internal quotation marks omitted).

<sup>259</sup> *Id.* at 564.

<sup>260</sup> *Id.* at 565.

<sup>261</sup> *Id.* (internal quotation marks omitted).

<sup>262</sup> Desai, *Transformation*, *supra* note 246, at 684 (internal quotation marks omitted).

<sup>263</sup> *Id.* at 690.

<sup>264</sup> Desai, *Wiretapping*, *supra* note 247, at 566-67.

certain newspapers.<sup>265</sup> The second issue was what rate should be charged for mailing newspapers.<sup>266</sup> Eventually, Congress voted against selective admission, based on fears that the policy would be used by the postmasters to discriminate against publications they disagreed with.<sup>267</sup> As for rates, the legislature decided on reduced rates for newspaper subscribers, mostly subsidized by letter writers.<sup>268</sup> This newspaper subsidy was based on the idea that in a republic, it was the government's responsibility to ensure citizens have access to information about public affairs.<sup>269</sup> The passage of this Act set in motion important policies that would shape the Post Office as an institution, and eventually shape constitutional law.<sup>270</sup>

Another consequence of the 1792 Post Office Act was the formation of a functional monopoly of the Post Office.<sup>271</sup> This happened because Congress chose to retain the power to designate postal routes.<sup>272</sup> This power gave representatives a chance to bring back tangible benefits to their district in the form of a Post Office and mail service—what we might today call congressional “pork.” Naturally, this led to the rapid proliferation of postal routes, even to areas with very small populations. This ubiquity of mail routes made the Post Office the most effective conveyor of information across long distances, leading to a “practical dependence of the public upon the [P]ost [O]ffice,” as Justice Holmes would later state.<sup>273</sup> This effective monopoly had later implications for constitutional law.<sup>274</sup>

Desai emphasizes that privacy of correspondence and subsidized rates for newspapers both developed independently of the Constitution.<sup>275</sup> These republican principles had already been written into the 1782 Postal Ordinance, and the Constitution was ratified in 1789. Thus, the principles of privacy of correspondence and newspaper subsidies pre-dated the Constitution.

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<sup>265</sup> Desai, *Transformation*, *supra* note 246, at 691-92.

<sup>266</sup> *Id.* at 692-95.

<sup>267</sup> *Id.* at 692.

<sup>268</sup> *Id.* at 694.

<sup>269</sup> *Id.* at 695.

<sup>270</sup> *Id.* at 693.

<sup>271</sup> *Id.* at 700-03.

<sup>272</sup> *Id.* at 701-03.

<sup>273</sup> *Id.* at 694 (internal quotation marks omitted).

<sup>274</sup> *Id.*

<sup>275</sup> Desai, *Wiretapping*, *supra* note 247, at 568.

How then did this minor postal act find its way into constitutional law? Tracking Desai, I address each principle separately—the Fourth Amendment principle of privacy of correspondence, First Amendment restrictions on government subsidies, and the First Amendment “right to receive” ideas.

Privacy of correspondence was first addressed in *Ex Parte Jackson*.<sup>276</sup> Though the case is primarily seen today through the lens of its First Amendment implications, Desai points out that this is the first case in which the Court acknowledged a right to privacy of correspondence.<sup>277</sup> The fact pattern of the case had nothing to do with the opening of sealed letters—the petitioner, Orlando Jackson, had been convicted for mailing information about a lottery.<sup>278</sup> The case mainly revolved around whether the government had the right to prevent certain materials deemed “unmailable” from being mailed.<sup>279</sup> The Court eventually upheld the statute and Jackson’s conviction.<sup>280</sup> However, the majority added in dictum that it could not enforce the statute by opening sealed letters.<sup>281</sup> It is this dictum that first addresses the issue of privacy of correspondence: “[A] distinction is to be made . . . between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined.”<sup>282</sup>

The Court further stated, “The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be.”<sup>283</sup> Desai claims that the Court “effectively characterized a letter passing through the mail system as the sender’s ‘papers’ for Fourth Amendment purposes.”<sup>284</sup> The principle of privacy of mail

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<sup>276</sup> *Ex parte Jackson*, 96 U.S. 727 (1878); Desai, *Wiretapping*, *supra* note 247, at 568-69.

<sup>277</sup> See Desai, *Wiretapping*, *supra* note 247, at 569.

<sup>278</sup> *Id.* at 570.

<sup>279</sup> *Id.*

<sup>280</sup> *Jackson*, 96 U.S. at 737; Desai, *Wiretapping*, *supra* note 247, at 575.

<sup>281</sup> *Jackson*, 96 U.S. at 733; Desai, *Wiretapping*, *supra* note 247, at 575.

<sup>282</sup> *Jackson*, 96 U.S. at 733; Desai, *Wiretapping*, *supra* note 247, at 575 (quoting *Jackson*, 96 U.S. at 733).

<sup>283</sup> *Jackson*, 96 U.S. at 733; Desai, *Wiretapping*, *supra* note 247, at 575 (quoting *Jackson*, 96 U.S. at 733).

<sup>284</sup> Desai, *Wiretapping*, *supra* note 247, at 575.



correspondence was thus constitutionalized. “Justice Field saw in the Fourth Amendment not what the constitutional drafters had put there, but instead what postal policymakers had incorporated into the structure of the Post Office.”<sup>285</sup> This judicial interpretation based on the Post Office is an example of path dependence and risk aversion—the traditions of an institution becoming reinforced over time because people prefer the less risky path of status quo. This principle of privacy of correspondence as applied to mail was simply announced as a self-evident truth, even though no mention of it had appeared in the Constitution, and even though the notion itself was new in the 18<sup>th</sup> century.

*Milwaukee Leader*<sup>286</sup> and *Hannegan v. Esquire*<sup>287</sup> provide examples of how the Supreme Court made postal subsidies for newspapers a matter of constitutional law.<sup>288</sup> The *Milwaukee Leader* case involved a Socialist newspaper that was denied subsidized mailing rates, because it was deemed “nonmailable.”<sup>289</sup> The Court held that the newspaper could be denied the subsidized rate.<sup>290</sup> In his dissent, Justice Brandeis characterized the denial of the subsidy as akin to a “penalty” or “fine.”<sup>291</sup> He further stated that such discrimination was “effective censorship.”<sup>292</sup> Desai points out that Brandeis’s reasoning was closely entwined with particular attributes about the Post Office itself.<sup>293</sup> Specifically, the monopoly that the Post Office held over long distance communication, and the subsidies provided to other publications, would likely cause the newspaper to lose money and fold.<sup>294</sup> Brandeis’s reasoning is dependent on this institutional context—and tends to reflect the operation of some of the cognitive biases described above. For example, it is not necessarily the case that denying a subsidy to this newspaper is effective censorship; it might be

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<sup>285</sup> *Id.* at 577.

<sup>286</sup> *U.S. ex rel. Milwaukee Soc. Dem. Pub. Co. v. Bureleson (Milwaukee Leader)*, 255 U.S. 407 (1921).

<sup>287</sup> 327 U.S. 146 (1946).

<sup>288</sup> Desai, *Transformation*, *supra* note 246, at 708-09.

<sup>289</sup> *Id.* at 709 (internal quotation marks omitted).

<sup>290</sup> *Milwaukee Leader*, 255 U.S. at 416; Desai, *Transformation*, *supra* note 246, at 709-10.

<sup>291</sup> *Milwaukee Leader*, 255 U.S. at 424 n.7, 434-35 (Brandeis, J., dissenting); Desai, *Transformation*, *supra* note 246, at 711.

<sup>292</sup> *Milwaukee Leader*, 255 U.S. at 432 (Brandeis, J., dissenting); Desai, *Transformation*, *supra* note 246, at 712.

<sup>293</sup> Desai, *Transformation*, *supra* note 246, at 712.

<sup>294</sup> *Id.* at 712-13.

distributed through means other than the Post Office. Brandeis's reliance on the institutional characteristics to make a broader point, unrelated to the institution, reflect a motive to simplify.

*Hannegan v. Esquire* focused on a similar question: whether the Postmaster General had the power to determine what was eligible for subsidized second-class mailing rates.<sup>295</sup> In this case, the Postmaster had determined that *Esquire* magazine was not entitled to second class rates because it was deemed sexually explicit.<sup>296</sup> This time, the Court ruled that the Postmaster did not have the power to decide which publications were eligible for subsidized mailings.<sup>297</sup> The Court stated that to give the Postmaster that power would amount to censorship, and to give a government official the power to decide "[w]hat is good literature, what has educational value, what is refined public information, [or] what is good art . . . smacks of an ideology foreign to our system."<sup>298</sup> Desai points out that such an assertion, taken out of the context of the Post Office, is simply wrong.<sup>299</sup> For example, public university professors and public school teachers are hired specifically for the purpose of deciding what is good literature or has educational value.<sup>300</sup> Again, the Court relies on the institutional context of the Post Office to explain its reasoning, even though its conclusions are not related to the Post Office.<sup>301</sup>

It is interesting to think about what the court might decide if Congress had decided not to subsidize newspapers, or to charge newspapers according to the distance the paper traveled. Would the issue then become one of whether subscribers living too far away are being denied their free speech rights? The point, of course, is not that these decisions were substantively incorrect; instead, it is that this reasoning reveals a tendency to use existing *non-binding* rules to justify subsequent decisions. The notion that newspapers had a right to subsidized postage was not mentioned in the Constitution. Yet somewhere along the line it became a conventional truth.

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<sup>295</sup> *Id.* at 715.

<sup>296</sup> *Hannegan v. Esquire*, 327 U.S. 146, 148-49 (1946); Desai, *Transformation*, *supra* note 246, at 715.

<sup>297</sup> *Esquire*, 327 U.S. at 157-58; Desai, *Transformation*, *supra* note 246, at 715.

<sup>298</sup> *Esquire*, 327 U.S. at 157-58; Desai, *Transformation*, *supra* note 246, at 716.

<sup>299</sup> Desai, *Transformation*, *supra* note 246, at 716.

<sup>300</sup> *See id.*

<sup>301</sup> *See id.*

The Court even referred to “our traditions” of providing newspaper subsidies.<sup>302</sup>

The Post Office’s monopoly over long distance communication makes its way into *Lamont v. Postmaster General*.<sup>303</sup> By the 1920s, the Post Office’s monopoly over long distance communication was such an entrenched reality that the reasoning of the case was shaped around that fact.<sup>304</sup> Though the Court did not allude much to the Post Office, one can see their dependence on that specific institution by looking at how the Court dealt with the “right to receive” in a different case, *Board of Education v. Pico*.<sup>305</sup> In that case, the attempt to apply the “right to receive” to books in a public school library did not succeed.<sup>306</sup> The analogy failed because most of the Justices felt the institutional differences between the Post Office and public schools were too great.<sup>307</sup> The notion that the Post Office constituted a monopoly played a large part in the development of the “right to receive” doctrine. According to then-Justice Rehnquist, if a person could not receive materials through the mail, it was the equivalent of a “complete denial of access to the ideas sought,”<sup>308</sup> because the Post Office constituted an effective monopoly. Desai points out that Rehnquist makes an overstatement—a person could indeed receive ideas through other avenues (something that is probably even more true today).<sup>309</sup> Rehnquist’s reasoning reveals a motive to simplify, a preference for the simpler of two explanations. The inability to receive materials in the mail only constituted a “complete denial” in the context of the monopolistic Post Office. For example, if the Post Office Act of 1792 had instead ceded power to the Executive to designate postal routes, and as a result our postal service had been much smaller, the “right to receive” may very well not have developed, at least in the context of receiving mail. Thus, the reasoning behind the “right to receive” cannot be divorced from its institutional underpinnings.

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<sup>302</sup> *Id.* at 716.

<sup>303</sup> 381 U.S. 301 (1965); Desai, *Transformation*, *supra* note 246, at 718.

<sup>304</sup> See Desai, *Transformation*, *supra* note 246, at 718.

<sup>305</sup> 457 U.S. 853 (1982); Desai, *Transformation*, *supra* note 246, at 723.

<sup>306</sup> Desai, *Transformation*, *supra* note 246, at 723.

<sup>307</sup> *Id.*

<sup>308</sup> *Lamont*, 457 U.S. at 913 (Rehnquist, J., dissenting); see also Desai, *Transformation*, *supra* note 246, at 722 (internal quotation marks omitted).

<sup>309</sup> *Id.*

So what is happening here? How do ideas that were novel in the eighteenth century, having nothing to do with constitutional law, become a matter of constitutional law in the twentieth? Let us return to the late eighteenth century, when the new American republicans had recently escaped the clutches of British rule. A framing effect may have affected their decision-making when it came to Post Office policy. Recall that a framing effect is observed when a decision maker's choices are affected by the way those choices are described.<sup>310</sup> Faced with a decision to either allow all newspapers to be published or only some newspapers to be published, the decision makers chose to allow all newspapers to be published. Each decision was viable—proponents of selective admission argued that newspapers overburdened the mail system, which was “by no means an idle concern.”<sup>311</sup> Those who supported universal admission argued that those in power could discriminate against those who were not, an idea borne out by the history of British blocking of newspapers.<sup>312</sup> When the issue was framed as “what the British did” versus “what the British didn't do,” the decision makers were bound to choose the positively framed choice—“what the British didn't do.”

This new idea, that all newspapers should be published regardless of content, was accepted as “tradition” by the twentieth century.<sup>313</sup> This may have been path dependence at work: our current perception of political and economic outcomes determined by the timing in which the earlier decision was made. So, over time, this initial decision to universally accept all newspapers (itself the result of a framing effect), became Post Office tradition.

Finally, once this idea had become entrenched Post Office tradition, a series of heuristics may have further entrenched it into constitutional law. Using the typology above, I argue that these cases reflect factor (1), because the Post Office cases were clearly not binding on the subsequent constitutional cases. To an extent, the cases also reflect factor (2), because the prior legal analysis regarding the Post Office effectively got “imported” into the constitutional cases. The motives to simplify and cohere are also at play. If the Court had started anew with the constitutional cases (not an

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<sup>310</sup> See *supra* notes 114-116 and accompanying text.

<sup>311</sup> *Id.* at 691.

<sup>312</sup> *Id.* at 691-92.

<sup>313</sup> See *supra* notes 295-302 and accompanying text.

unreasonable proposition, since the cases were, after all, ones of first impression), arguably similar cases could have spawned multiple lines of doctrinal development. Adopting the Post Office line of doctrine in constitutional cases led to case law that was not only simpler (fewer lines of doctrine) but also more coherent (a single story to explain disparate phenomena). Over time, path dependence led us to apply these early precedents in cases that have nothing to with their origin. For example, the Ninth Circuit has recently held that an individual has a privacy interest in the contents of a text message, but not the number to which he was sending the text message.<sup>314</sup> One has no such privacy interest because he has no such expectation in the to/from e-mail address in an e-mail message. And that is so because one has a privacy interest in his telephone conversation but not the numbers he has dialed. And that is so because—you see where this is going—you have a privacy interest in your letters, but not the address on the outside.<sup>315</sup>

The point is not that these decisions are incorrect or even that they would not have come about in the absence of the early Post Office cases. Desai repeatedly, and explicitly, says that our existing set of doctrinal rules could very well have come about even in the absence of the Post Office statutes and cases.<sup>316</sup> This underscores my overall theme in this Article: the fact that *stare decisis* reflects cognitive bias, in theory or in practice, does not *necessarily* mean that the decisions reached are incorrect. It merely means that we should be particularly vigilant about our reliance on prior decisions.

### 3. Testing the Prediction III: The Global War on Terror

Over the course of this Article, I have used the terms “precedent” and “*stare decisis*” mostly interchangeably, though doctrinally, there is a slight difference between the two (which is not relevant here).<sup>317</sup> However, the idea of precedent, loosely defined, affects decision-making in all sorts of contexts beyond the law. Although this Article takes aim at the doctrine of

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<sup>314</sup> See *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 905 (9th Cir. 2008).

<sup>315</sup> *Id.* at 904-05.

<sup>316</sup> See, e.g., Desai, *Transformation*, *supra* note 246 at 702 (“Although I do argue that the Post Office’s characteristics were embedded into the fabric of constitutional doctrine, I am not arguing that we would not have these two doctrines today without their origins in postal policy.”).

<sup>317</sup> See *supra* note 34 and accompanying text.

precedent in the law as commonly understood, it has broader application as well. As Schauer points out,

Appeals to precedent do not reside exclusively in courts of law. Forms of argument that may be concentrated in the legal system are rarely isolated there, and the argument from precedent is a prime example of the nonexclusivity of what used to be called “legal reasoning.” . . . In countless instances, out of law as well as in, the fact that something was done before provides, by itself, a reason for doing it that way again.<sup>318</sup>

The implications of my argument are reflected in a series of decisions regarding the Global War on Terror (GWOT). Shortly after the terrorist attacks of September 11, 2001, the United States began detaining suspected terrorists at Guantanamo Bay, Cuba.<sup>319</sup> Two related issues arose: first, the permissible legal limits of the interrogation techniques the federal government could use against the detainees, and second, what, if any, legal process the detainees would have access to, including rights to habeas corpus or similar procedures.<sup>320</sup> It is no exaggeration to say that the GWOT is unprecedented in its nature and scope. This novel situation provides a good test of the arguments I have advanced in this Article.

In the first example, the government had to determine what interrogation techniques the military and intelligence officers could use on the detainees. By way of federal criminal law and international agreements, the United States was bound not to use “torture.”<sup>321</sup> John Yoo, then at the Department of Justice, was given the unenviable task of defining what exactly constituted torture.

Yoo has since been reviled by many for his callous formulation of what constituted torture.<sup>322</sup> Yoo explained that one of the elements of torture was “severe pain or suffering” and that, “to constitute torture[,] ‘severe pain’ must rise to . . .

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<sup>318</sup> Schauer, *Precedent*, *supra* note 7, at 572.

<sup>319</sup> See, e.g., Katharine Q. Seelye, *A Nation Challenged: The Prisoners; First ‘Unlawful Combatants’ Seized in Afghanistan Arrive at U.S. Base in Cuba*, N.Y. TIMES, Jan. 12, 2002, at A7.

<sup>320</sup> See, e.g., Daphne Eviatar, *Foreigners’ Rights in the Post-9/11 Era: A Matter of Justice*, N.Y. TIMES, Oct. 4, 2003, at B7.

<sup>321</sup> See 18 U.S.C. § 2340A (2006) (prohibiting torture); *id.* § 2441 (prohibiting war crimes); Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Apr. 30, 1994, 108 Stat. 463, 1465 U.N.T.S. 113.

<sup>322</sup> See, e.g., Posting of Tim Dickinson to RollingStone.com’s National Affairs Blog, <http://www.rollingstone.com/nationalaffairs/> (Apr. 2, 2009, 4:39 EST).

the level that would ordinarily be associated with a physical condition or injury sufficiently serious that it would result in death, organ failure, or serious impairment of body functions.”<sup>323</sup> Far from reflecting Yoo’s heartlessness, however, the phrase reflects his susceptibility to the heuristics that affect all of us.

As Yoo pointed out in an interview a few years after he authored the now-infamous memo, the question he faced in defining “severe pain or suffering” was, “has Congress ever used this phrase anywhere before?”<sup>324</sup> Yoo found that Congress had in fact defined the phrase, in a statute that Yoo “th[ought] [] was about health care.”<sup>325</sup> But there was more; the interviewer pressed Yoo on the issue:

Esquire [Magazine interviewer]: John, you’re a very engaging guy, I like you—I can’t picture you writing that phrase “organ failure or death.”

Yoo: *It’s the phrase Congress used.* The main criticism, which is certainly fair, is that statute is so different from this one, how can you borrow the language of one and include it in the other. On the other hand, *that’s the closest you can get to any definition of that phrase at all.*<sup>326</sup>

The section of the memo that analyzed the meaning of “severe pain or suffering” is relatively short, less than a page of single-spaced text.<sup>327</sup> The analysis began by noting that simple “pain or suffering” would be insufficient to constitute torture; 18 U.S.C. § 2340 requires that such pain or suffering be “severe.”<sup>328</sup> The statute, however, does not define “severe.” Yoo looked in two places to determine the definition of “severe . . . pain or suffering.”<sup>329</sup> First, the memo laid out the dictionary definitions of severe.<sup>330</sup> Second, the memo explained how the

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<sup>323</sup> Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., U.S. Dep’t of Justice, to William J. Haynes II, Gen. Counsel, U.S. Dep’t of Defense 38-39 (March 14, 2003) (internal quotation marks omitted).

<sup>324</sup> “Torture Memo” Author John Yoo Responds to This Week’s Revelations, *ESQUIRE*, Apr. 3, 2008, available at <http://www.esquire.com/the-side/qa/john-yoo-responds>.

<sup>325</sup> *Id.*

<sup>326</sup> *Id.* (emphasis added).

<sup>327</sup> Yoo, *supra* note 323, at 38-39.

<sup>328</sup> *Id.* at 38 (emphasis added) (internal quotation marks omitted) (citing 18 U.S.C. § 2340 (2006)).

<sup>329</sup> *Id.* (internal quotation marks omitted).

<sup>330</sup> *Id.*

phrase “severe pain” was used in another Congressional statute.<sup>331</sup>

Congress’s use of the phrase “severe pain” elsewhere in the U. S. Code can shed more light on its meaning. *See, e.g., West Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100 (1991) (“[W]e construe [a statutory term] to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law.”).<sup>332</sup>

Yoo notes that in “statutes defining an emergency medical condition for the purpose of providing health benefits,”<sup>333</sup> “severe pain” is treated “as an indicator of ailments that are likely to result in permanent and serious physical damage in the absence of immediate medical treatment. Such damage must rise to the level of death, organ failure, or the permanent, impairment of a significant body function.”<sup>334</sup>

There are two points I want to make regarding Yoo’s analysis. First, as the case cited by Yoo itself notes, a statutory term is to be given a uniform definition across contexts only when doing so “fits . . . logically.”<sup>335</sup> Arguably, using a definition relating emergency medical services in the torture context does not fit logically, and attempting to make it fit reflects the motives to cohere and simplify.

Second, and more to the point, Yoo’s conclusion reflects at least factors (1), (2), and (3) laid out at the beginning of this Part. Obviously, Yoo’s memo is not a judicial decision, but the same principles apply. The analysis reflects factor (1) because Yoo is relying on prior analysis that is not binding in the “instant case.” In other words, the language Yoo relies on is not from any case involving torture, or even criminal law. There may have been reasons for doing so,<sup>336</sup> but the fact remains that what Yoo relied on was not on point.

Yoo’s memo also reflects factor (2), a relative lack of legal analysis. The background on § 2340 (and 2340A) and the discussion of the specific intent requirement are about twice as

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<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 100 (1991)

<sup>336</sup> *See Yoo, supra* note 323, at 38 (“Although the[] [other] statutes address a substantially different subject from section 2340, they are nonetheless helpful for understanding what constitutes severe physical pain.”). Note, however, that Yoo does not explain *why* the other statutes are helpful; the sole reason appears to be that the other statute happens to use the phrase “severe pain.”



long as the section on “severe physical pain.”<sup>337</sup> About half of the section on physical pain simply recites the dictionary definition of the word “severe,” and the only legal analysis on point is the discussion of the (arguably irrelevant) statutes.<sup>338</sup>

Finally, Yoo’s memo reflects factor (3), resolving ambiguity in favor of the extant law. It is not unreasonable to think that the “unprecedented” attacks of September 11th would result in (and might even *require*) a legal analysis that did not rely on pre-existing doctrines and pre-existing, but unrelated, legal categories.

These kinds of judgments, however, are precisely what my hypothesis would predict. Relying on “precedent” applies to all kinds of legal reasoning, not just judicial opinions. The motive to cohere and the motive to simplify are at work; the same standard is applied across contexts because doing so simplifies the realm of legal doctrine and brings coherence to an ambiguous area of torture law. The availability heuristic is also prominent: Yoo’s memo relies on the readily available formulation even though it did not, even by his own admission, bear directly on the issue at hand.

The GWOT provides another occasion to examine the Supreme Court’s use of arguments about precedent. First, the mere fact that something has not previously been done is an argumentative trump, even at the Supreme Court.<sup>339</sup> Second, this mode of reasoning applied even in cases raising questions about enemy combatants’ due process rights. In *Rumsfeld v. Padilla*, Chief Justice Rehnquist, writing for the Court, responded to Justice Stevens’s dissent by writing, “the dissent cannot cite *a single case* in which we have deviated from the longstanding rule we reaffirm today.”<sup>340</sup> Justice Scalia, dissenting in *Hamdan v. Rumsfeld*, complained that the majority “cannot cite *a single case* in the history of Anglo-American law (before today) in which a jurisdiction-stripping provision was denied immediate effect in pending cases . . . .”<sup>341</sup> In both cases, the absence of a case on point was a crucial, if

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<sup>337</sup> See *id.* at 34-39.

<sup>338</sup> See *id.* at 38-39.

<sup>339</sup> See, e.g., *Jones v. Bock*, 549 U.S. 199, 222 (2007) (“[R]espondents cite no case interpreting this provision” the way they do); *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 247 (2005) (Scalia, J., concurring) (Smith “cites no case for this proposition”); *McKune v. Lile*, 536 U.S. 24, 26 (2002) (“Respondent fails to cite a single case from this Court” supporting its position).

<sup>340</sup> 542 U.S. 426, 449 (2004).

<sup>341</sup> 548 U.S. 557, 659 (2007) (Scalia, J., dissenting).

not dispositive, argument, so important that the relevant words were italicized. Yet, just as with Yoo's memos, one might think that the GWOT might require novel legal or analytical approach.

Yoo's goal in writing the memo was to provide bright-line rules regarding torture.<sup>342</sup> This may or may not be a worthwhile goal. But my point is a different one: even in a war that presented "unprecedented dangers,"<sup>343</sup> a critical juncture of the issue presented—how much physical pain is so severe as to constitute torture—relies on quite ordinary, and to some extent cursory, legal analysis. Although the importance of the law and policy issues at stake prompted careful legal analysis, it was impossible to completely eliminate the effect of cognitive bias on the legal conclusions. This underscores my overall point. It's not only difficult to overcome these cognitive biases: because the biases operate subconsciously, it is often impossible.

#### B. *Truth or Stability?*<sup>344</sup>

Earlier, I quoted Adrian Vermeule and pointed out that "[t]he key point is not that judges are likely to get things wrong; it is that when they do get things wrong, they are likely to err in systematic rather than random ways."<sup>345</sup> Vermeule's point applies to my analysis as well. The key point is not just that we humans have certain cognitive biases; it is that when our decisions are skewed, they are likely to be skewed in systematic rather than in random ways.<sup>346</sup>

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<sup>342</sup> See "Torture Memo" Author John Yoo Responds to This Week's Revelations, *supra* note 324.

<sup>343</sup> George W. Bush, U.S. President, The President's State of the Union Address (Jan. 29, 2002).

<sup>344</sup> Thanks to Zachary Clopton and Frederick Schauer for (separately) highlighting this issue for me.

<sup>345</sup> Vermeule, *Common Law Constitutionalism*, *supra* note 23, at 1501.

<sup>346</sup> This is not to suggest that there are not countervailing cognitive biases. For example, some combination of optimism bias and overconfidence may lead individuals to *shun* existing arrangements in favor of their own, idiosyncratic views. See, e.g., Antonio E. Bernardo & Ivo Welch, *On the Evolution of Overconfidence and Entrepreneurs* 1-2 (Yale Int'l Ctr. for Fin., Working Paper No. 00-48, 2001), available at <http://ssrn.com/papers=275516>. Bernardo and Welch argue that the overconfident—those who, presumably, are less likely to exhibit the biases I describe in Part III.A—are more likely to be entrepreneurs and risk-takers. See generally *id.* There are two responses. First, the literature demonstrates far more "backward-looking" biases than "forward-looking" biases. Second, the people Bernardo and Welch identify are, by definition, the exception. My Article, on the other hand, is aimed at the characteristics that are reflected in most people's behavior, most of the time.

Then the question is, “So what?” Maybe our expressed preferences—as humans, as citizens, as lawyers—are unduly weighted toward the past. Is this really problematic? Maybe the law is “wrong” as measured against some idealized notion of humans’ preferences (if such an ideal could even be extrapolated), but this may not pose any practical problems. If the law is not meant to embody some intrinsic truth, but instead is merely meant to be stable and predictable, then this problem seems illusory.

For example, if we are not concerned about the substantive content of the law, then it does not matter whether there is an implied private right of action under section 304 or not. So long as a rule is established, and relatively unlikely to change over time, then the law is at least stable and corporations and shareholders can act accordingly. For example, instead of repeatedly litigating the section 304 question, shareholders might focus on other causes of action and thus save resources. Moreover, acute awareness of the possibility of bias might require judges to constantly re-evaluate legal rules, putting the rules in a state of flux and making them unpredictable and unstable.

However, I argue that this problem is overblown. Even if law is merely meant to foster stability, and even if we are completely agnostic about the substantive content of the law, my analysis poses problems with the doctrine of stare decisis whether we are concerned about truth, stability, or both.

### C. *Problems in Both Cases, and Some Solutions*

Imagine that you have a gun that, due to some mechanical error, always fires slightly (but somewhat

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I should note (as may already be apparent to some readers!) that my analysis is not perfect. One hundred percent of the population is not biased toward the status quo; some people may buck the trend in the face of even the most forceful cascade. Just because most people will demonstrate some quality most of the time does not mean all people will do so all of the time. However, as Hanson and Yosifon write in *The Situation*,

[T]o best promote human understanding and well-being, legal theories must be anchored in a reality-based understanding of human thinking and behavior. Realism, we think, is critical. To be realists, on this telling, means to begin with real humans and to build models from there, rather than to begin with models and then view and interpret humans through them.

Hanson & Yosifon, *The Situation*, *supra* note 20, at 183. Even if there are exceptions, policymaking must generally be based on how most people will react to a given situation.

unpredictably) to the left of where it is aimed. Now imagine that the error is brought to your attention. What do you do? Broadly speaking, there are three options. First, you might decide that your gun's aim is off enough that you buy a new gun, one that does not have this error. Second, you might decide that the slight unpredictability is not reason enough to buy a new gun, so you will just aim slightly to the right from now on and correct the gun's bias. Finally, you might decide that you generally want to shoot to the left anyway, and that therefore you won't change much at all. The gun's "leftness" is a good thing to be aware of, but since it generally gets you where you want to wind up, it is not going to affect your actions.

This analogy tracks the argument made in this Article. The evidence put forth in Part III suggests that our court decisions will tend, for situational and psychological reasons, to be rooted in history, tradition, and precedent. The theory I infer predicts that we will choose these existing arrangements, not because they are the best of all possible worlds, but merely because they exist. In other words, our jurisprudential gun will always shoot slightly to the left. However, the evidence does not provide perfect predictive power. Precedent is sometimes disregarded and cases do get overruled. Thus, although our decisions are rooted in the past, it is not possible to predict with complete certainty how firm the roots are and when they will be broken.

And so, broadly speaking, there are three alternatives. I term these the strong case, the middle case, and the weaker case. In the strong case, stare decisis is fundamentally unworkable, so the only option is to buy a new gun. In the middle case, stare decisis is seen as a "thumb on the scale" for the cold hand of the past. Aware of this information, we might aim slightly to the right, by lessening but not eliminating our dependence on stare decisis. In the weaker case, the theory offers very little. It sheds some light on reasons why our jurisprudential gun aims to the left, but if we want a system that is resistant to change, then we may simply decide that the cognitive biases outlined above do not change the systemic calculus (and may, in fact, provide reasons why the current system is *preferable*). I discuss each of these possibilities in turn.

### 1. The Strong Case

The strongest form of the argument is that the legal system reflects cognitive shortcomings and nothing more, so we should scrap stare decisis and look to another way to adjudicate cases. Under the strong case, judges should not follow precedent other than as a last resort.

In the strongest form of the argument, our cognitive biases and heuristics make reliance on precedent unreliable. Therefore, courts should essentially engage in “de novo review” every time. A court would not be barred from following precedent—such a rule would be patently absurd—but there would be a strong presumption against doing so. On appellate review, a court would critically examine the lower court’s citation to precedent. The appellate court would be especially vigilant to monitor whether the district court was following precedent as a heuristic, for example, by evaluating the district court’s decision as measured against the five factors outlined in the previous part.<sup>347</sup> Moreover, in the strongest form of the argument, not only would the *practice* of stare decisis reflect cognitive bias, but the *doctrine itself* could be seen as arising as a reflection of bias—and nothing more.

### 2. The Middle Case

The “middle ground” of this argument considers stare decisis (history, precedent, stability) as one set of factors among many to consider when deciding legal rules. Under this “middle ground,” precedent should generally be respected, but the burden of proof is on the one who wants to maintain the status quo.

The middle ground can be illustrated with an example: Consider a legal dispute and a given set of facts. Assume further that the correct answer to this legal question is X, another reasonable answer is Y, and an unreasonable answer is Z. Under the current system of stare decisis, if an appeals court concludes Z, that conclusion is binding on all lower courts

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<sup>347</sup> For example, if the question of a private right of action had come up on appeal in *iBasis*, the reviewing court should have been wary of the decision below because there are strong grounds to think that the *iBasis* court relied on precedent—and non-binding precedent at that—as a heuristic. As it was, the *iBasis* appeal was voluntarily dismissed so the court never reached the merits. Judgment, *In re iBasis, Inc. Derivative Litig.*, No. 08-2055 (1st Cir. Feb. 20, 2009).

and on itself.<sup>348</sup> Under the “middle ground” that I propose here, a subsequent court might reason as follows: *An earlier court concluded Z. However, after reviewing the basis for that conclusion, we conclude that it was incorrect. Therefore, we conclude X.* Under this regime, a court would have the flexibility to depart from precedent and review the rule anew. In other words, the subsequent court would review the earlier case out of a concern that it would follow the prior rule as a heuristic rather than because of the informational content contained in the rule.

However, once the subsequent court concluded X or Y, *that* rule would be binding on subsequent courts. In other words, so long as the precedential rule was reasonable, it would be binding; courts would only be free to revisit precedent if they were convinced the earlier rule was incorrect.

### 3. The Weaker Case

The weaker case is that all my theory offers is a “tweak.” Under the existing doctrine, for example, the Supreme Court will not overrule its earlier precedent unless it has become demonstrably erroneous and unworkable.<sup>349</sup> Under the weakest version of the theory, this Article highlights one phenomenon that should go into the calculus when Justices are determining whether a given precedent is demonstrably erroneous or unworkable. At the lower court level, if judges could think of any plausible reason for sticking with the existing rule, then they should do it. Under the weakest version of my argument, lower courts will almost never be justified in deviating from the existing rule. The only possible exception might be in, for example, a SOX section 304 case in the District of Massachusetts or some other district that decided the private right of action question “late in the game,” so to speak. If, after an analysis like mine, a court was convinced to a high degree of probability that the existing rule was the result of a cascade, the court might be justified in deviating from the rule. Even under this conception, though, a

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<sup>348</sup> See, e.g., *United States v. Humphrey*, 2002 Fed.App. 0131P (6th Cir.), *overruled on other grounds by* *United States v. Leachman*, 2002 Fed.App. 0353P (6th Cir.) (explaining that a given Sixth Circuit panel is bound to follow precedential authority from another panel even if current panel is inclined to disagree with prior decision).

<sup>349</sup> See Nelson, *supra* note 54, at 1-3.

lower court would probably never be justified in refusing to follow a higher court's rule.

*D. An Important Qualification*

Imagine that I want to know if it will rain tomorrow.<sup>350</sup> You come to me and say, "I believe it will rain tomorrow." I take this piece of information and add it to the available data I have. Eventually, I use your information when I decide whether or not it will rain tomorrow (and presumably, your comment makes me somewhat more likely to think it will rain tomorrow).

But now imagine that I asked you *how* you know it will rain tomorrow, and you say, "It came to me in a dream." You didn't check the weather report, or look at your barometer, or collect any sort of data. Now, my faith in the epistemic basis of your claim is shaken, and your claim carries less weight than it otherwise would. However—and this is key—the fact that your information came to you in a dream *does not bear at all on whether it will actually rain tomorrow*. Maybe it will, for reasons related to your dream or not, but the sensible thing for me to do (ex ante) is to discount your assertion.

This analogy applies to my argument. It may be that stare decisis is desirable for a variety of reasons. However, the social psychological evidence suggests that we believe in stare decisis because it "came to us in a dream." Of course I don't mean that literally, but just as in the weather example above, the epistemic basis of our faith in stare decisis is called into question. The mere presence of cognitive bias can never tell us that our decision is wrong. Biases can only tell us that the reasons we *think* our decision was *right* are unreliable.

This qualification relates to the way I have referred to the psychological studies in this Article. If a coffee mug is "worth" five dollars, then we might say that it is irrational or otherwise "suboptimal" for a person to sell it for no less than ten dollars. In this instance, "suboptimal" would mean that the person made the wrong substantive decision: she should have sold the mug for five dollars but instead held out for ten to no avail.

I am not arguing that stare decisis is suboptimal in that sense. For example, *Casey* declined to overrule *Roe*, in part

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<sup>350</sup> Thanks to Adrian Vermeule for this example, which I adopt from his telling almost verbatim (to the best of my recollection).

because of considerations of stare decisis. One might read my argument to be that (1) stare decisis is rooted in cognitive bias; (2) bias leads to substantively suboptimal results; and therefore (3) *Casey* should have overruled *Roe*.

But that misreads my argument. My Article takes no position on whether *Casey* should have overruled *Roe* or any other substantive question. The behavioral phenomena I outlined earlier will never prove that a decision was wrong, or even that it was the product of bias. Indeed, some of the psychological literature argues that heuristics are not substantively suboptimal at all.<sup>351</sup> My point is not that the *decisions* were suboptimal in every case where precedent was followed. My point is that the *reasons* for arriving at that decision are suspect.

Another point worth noting: I am arguing for a decreased reliance on precedent in our system, but not for judges to be *oblivious* to rulings in earlier, like cases. At its inception, the doctrine of stare decisis did most of its work in making the law “common”—that is, in making legal rules standard across the various English counties. Certainly, uniformity is a desirable goal for any legal system, and (at least to some extent) advocates defend stare decisis on similar grounds today, arguing that it makes the law more stable, predictable, and efficient.<sup>352</sup>

Today, the “information sharing” function of stare decisis is significantly less important. With every published decision, and many unpublished decisions, available on Westlaw or Lexis within a matter of months (at most), search costs are dramatically lower. Judges are in a position to signal to each other in a way that they were not eight hundred or a thousand years ago.

Moreover, judges can and should learn from each other through this information-sharing. Even in the strongest case, procedurally rejecting stare decisis does not mean that judges are required to ignore other (correct) decisions. It does not even mean that judges should go out of their way to avoid the prior results. It merely means that stare decisis carries no normative weight, whereas in today’s jurisprudential system it is almost always dispositive.

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<sup>351</sup> See, e.g., GERD GIGERENZER ET AL., SIMPLE HEURISTICS THAT MAKE US SMART (1999).

<sup>352</sup> See *supra* Part II.B.



This leads to another point: even in the strongest case, even if the doctrine of stare decisis is eliminated altogether, judges will still rely on precedent. Suppose that my analysis is correct. (After all, that would be the only reason to decrease our reliance on precedent.) The phenomena catalogued in Part III suggest that, even in the absence of a formal mechanism by which judges are obliged to rely on prior decisions, *they will do so anyway*. In other words, even if the doctrine of stare decisis were to be eliminated in one fell swoop, my hypothesis implies that judges will still be relying on prior decisions in some manner. Thus, we would not completely lose the benefits that stare decisis provides.

*E. Will the World Come to an End? (No.)*

Stare decisis is defended on a variety of grounds.<sup>353</sup> If the hypothesis I advocate takes hold, and prior judicial decisions have diminished sway—even in like cases—will the legal system fall apart at the seams? If stare decisis “controls the caprice of judges by requiring them to suppose that all similar future cases will be decided according to their instant decision,”<sup>354</sup> a weaker role for precedent might encourage the caprice of judges. If stare decisis is “prudential and pragmatic,”<sup>355</sup> a weaker role for precedent might lead to imprudent and impractical outcomes. If stare decisis enables efficiency, a weaker role for precedent might throw parties’ prospective planning into disarray and harm our country’s economic prospects.

I do not dwell on these possible objections to my argument because I find them to be a canard. First, as others have pointed out, the increasing number of unpublished dispositions at the court of appeals level and oral decisions at the district court level means that a large number of cases are taken out of the “stare decisis database,” so to speak. Second, as Nelson has thoroughly explained, a decreased reliance on stare decisis by no means suggests that chaos will reign. Third, it is unlikely that a decreased reliance on stare decisis will undermine efficiency goals, as it is unclear whether the current system furthers those goals in the first place. Fourth, stare

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<sup>353</sup> See *supra* Part II.

<sup>354</sup> Kenneth J. Schmier & Michael K. Schmier, *Has Anyone Noticed the Judiciary’s Abandonment of Stare Decisis?*, 7 J.L. & SOC. CHALLENGES 233, 234 (2005).

<sup>355</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992).

decisis may in some cases undermine, rather than further, judicial legitimacy.

First, courts frequently, and by some accounts increasingly, rely on unpublished dispositions (at the appeals level) or oral dispositions (at the trial level).<sup>356</sup> Even though some of these decisions may be available via online databases, litigants are instructed not to cite them.<sup>357</sup> Schmier and Schmier argue that the “abandonment” of stare decisis—through the use of unpublished dispositions—is detrimental to the democratic process.<sup>358</sup> Whatever the merits of their argument, it is clear that if ninety-three percent of cases are decided without a published opinion, and where the practice has not had a tremendous destabilizing, delegitimizing, or efficiency-impeding effect on the law, a decreased reliance on stare decisis will probably not wreak havoc on the rule of law.

Second, and at a deeper level, a decreased reliance on stare decisis does not mean that courts should decide cases based on a whim. In his article, *Stare Decisis and Demonstrably Erroneous Precedent*, Caleb Nelson argues (for a variety of reasons unrelated to my Article) that stare decisis should not carry the almost-dispositive weight that it does under the current regime.<sup>359</sup> But Nelson does not argue—and neither do I—that judges should be entirely free to make any decision they want in a given case. Instead, Nelson adapts the administrative law model of *Chevron*<sup>360</sup> deference.<sup>361</sup> Under *Chevron*, a reviewing court will defer to an agency’s interpretation of a statute so long as that interpretation is “permissible,” even if the court would have chosen a different interpretation in the first instance.<sup>362</sup> A reviewing court is not bound by the agency’s interpretation if it is “impermissible.”<sup>363</sup>

Nelson proposes that a similar framework apply to stare decisis.<sup>364</sup> A lower court should be permitted to disagree with the stare decisis-given rule (to an extent that varies depending on which version of my theory is adopted), but its discretion would be limited, essentially by a reasonableness side

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<sup>356</sup> See, e.g., Schmier & Schmier, *supra* note 354, at 233.

<sup>357</sup> See *id.* at 233-34.

<sup>358</sup> See generally *id.*

<sup>359</sup> See generally Nelson, *supra* note 54.

<sup>360</sup> *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council*, 467 U.S. 837, 842-45 (1984).

<sup>361</sup> See Nelson, *supra* note 54, at 5-8.

<sup>362</sup> See *Chevron*, 467 U.S. at 842-45.

<sup>363</sup> See *id.*

<sup>364</sup> See Nelson, *supra* note 54, at 5-8.

constraint. Under such a system, erroneous or otherwise improper precedents would be more likely to be abandoned. The reviewing court should then uphold the lower court unless it is “impermissible,” i.e., if it has no reasonable basis in law or fact—or if it relied on stare decisis as a heuristic.

Nelson argues persuasively that a weaker version of stare decisis is likely to lead to a net benefit.<sup>365</sup> Among other things, the weaker version of stare decisis will lead to more overruling of prior decisions and, presumably, the law becoming more “correct” as a result. But this benefit is not without cost; as courts engage in more overruling, the law could become more uncertain and potentially unstable. Yet it is not necessarily clear that the current system, with a stronger form of stare decisis, is free from such uncertainty. After all, when legal questions are clear, individuals would probably not litigate them; the mere fact of litigation often signals that we are in a gray area. In those cases, the law would not be substantially more uncertain under a weaker version of stare decisis. And when litigants do bring a question where the correct answer is clear (or well-established, or easy to ascertain) there is a very good chance that judges will adhere to that correct answer, under *any* system of stare decisis, strong or weak.<sup>366</sup> As Nelson points out, even under a weaker regime, the law is more likely to move toward correct decisions, *even if* subsequent courts are as likely to be error-prone as their predecessors.<sup>367</sup>

This kind of a system is not—if you will excuse the pun—unprecedented. Appellate courts routinely affirm lower court rulings with which they might, writing on a blank slate, decide differently. For example, courts will affirm an agency’s adjudication so long as it is supported by substantial evidence, even if the court would have reached a different conclusion. When there is an appeal following trial, all inferences are drawn in favor of the jury’s verdict; the jury’s verdict is affirmed so long as there is any evidence that supports it. Issues not properly preserved for appeal are routinely reviewed for “plain error,” meaning that a court’s conclusion is upheld unless there is no reasonable basis for the lower court’s ruling. In short, there are already a wide range of cases where an

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<sup>365</sup> See *id.* at 54-78.

<sup>366</sup> See *id.* at 54-60.

<sup>367</sup> See *id.* at 59-60.

appeals court will uphold a decision it might disagree with, so long as it has some basis in law or fact.

Now imagine that a case presents certain facts. One judge might reach one conclusion, X, that is reasonable under the circumstances. Some time later, on similar facts, another judge might conclude Y. If the standard of review is plain error, an appeals court—the same appeals court—could very well permit both decisions to stand under the status quo. This is not much different from the result that would obtain under a system with a weaker reliance on precedent.

Third, it is highly unlikely that a system with decreased reliance on stare decisis will undermine efficiency goals (bracketing the question of whether economic efficiency should be the goal of a system of justice at all). For example, Stake wrote in a recent article that the demise of the fee tail estate demonstrates the efficiency of the common law: the fee tail, by holding that only first-born sons could inherit property, was inefficient; the common law ultimately abolished the fee tail, suggesting that the common law moves toward efficiency.<sup>368</sup> However, as Hirsch points out in a persuasive reply, the common law is not a natural system that arose of its own accord; “it is also, through and through, a participatory system. Human participation cannot but leave its indelible stamp.”<sup>369</sup> That stamp, he argues, includes phenomena such as the stickiness of legal rules, status quo bias, and the availability heuristic.<sup>370</sup> In other words, these psychological phenomena undercut the common-law-as-efficiency hypothesis, even in a very limited context (fee tails and other perpetuities).

Along these lines, no less a titan in the law and economics field than Judge Richard Posner (and co-authors) looked at the Economic Loss Rule in tort law, the doctrine which holds one cannot sue for economic loss without physical injury under certain circumstances. The doctrine arose around the 1960s and 70s, and its application gained ground in various states over time.<sup>371</sup> Yet after conducting a detailed empirical

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<sup>368</sup> Jeffrey Evans Stake, *Evolution of Rules in a Common Law System: Differential Litigation of the Fee Tail and Other Perpetuities*, 32 FLA. ST. U. L. REV. 401, 410-16 (2005).

<sup>369</sup> Adam J. Hirsch, *Evolutionary Theories of Common Law Efficiency: Reasons for (Cognitive) Skepticism*, 32 FLA. ST. U. L. REV. 425, 427 (2005).

<sup>370</sup> *Id.* at 430-31.

<sup>371</sup> See generally Anthony Niblett, Richard Posner & Andrei Shleifer, *The Evolution of a Legal Rule* 4 (3rd Annual Conference on Empirical Legal Studies Papers, Working Paper, 2008), available at <http://ssrn.com/papers=1114941> (noting that the

analysis, Posner and his co-authors conclude that the law did not converge on any given point, evolved inconsistently, and, under almost any interpretation, did not converge on efficiency.<sup>372</sup> Of course, this does not mean that no legal rules ever converge on efficiency. It does, however, mean that any critique of *my* argument that suggests that my proposal will throw into whack an already-efficient system is, at best, incomplete, and at worst, flat wrong.

Fourth, although stare decisis is thought to further the legitimacy of the judicial system (by controlling the caprice of individual judges), it may in some cases have the opposite effect. As noted above,<sup>373</sup> it is not uncommon for district courts to adhere to a rule while telling the parties that they disagree with that rule. In a typical court case, one party is on the losing side. The losing party may come to view the court as *less* legitimate for sticking to a rule that it acknowledges is incorrect or otherwise inapplicable.

Finally, it is worth noting that a critique against my Article's premise contains the seeds of its own response. To put it another way: I assume at the outset of this Article that stare decisis has a constraining effect on judges and that effect pushes decisions toward the past. Reasoning from that premise, and on the basis of psychological evidence, I conclude that stare decisis should have a diminished role in our jurisprudential system.

However, some people argue that stare decisis *already* does very little work to constrain judges because (1) judges are simply enacting their own political preferences, (2) there is so much prior case law, encompassing so many sets of facts, that "precedent" can be used to justify virtually any position, or (3) both.<sup>374</sup> I find this argument to be unpersuasive. The

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doctrine was first articulated in 1965); *id.* at 5 (explaining that the doctrine was applied to construction cases in the 1970s).

<sup>372</sup> See *id.* at 6.

<sup>373</sup> See *supra* note 187.

<sup>374</sup> See, e.g., HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT 287 (1999) (concluding that precedent did not constrain Supreme Court Justices); Giacomo A. M. Ponzetto & Patricio A. Fernandez, *Case Law Versus Statute Law: An Evolutionary Comparison*, 37 J. LEGAL STUD. 379, 389 (2008) (citing a variety of scholars and concluding that "precedents are malleable and can be interpreted with ample leeway"). This view is not without its detractors. See, e.g., Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018, 1032 (1996) (concluding that stare decisis constrains judges' policy preferences); Emery G. Lee III, *Horizontal Stare Decisis on the U.S. Court of Appeals for the Sixth Circuit*, 92 KY. L.J. 767, 791 (2004) (concluding that horizontal stare decisis constrains judges' decisions in the overwhelming majority of

overwhelming majority of cases are simply not politically charged, so that political preferences do not even enter the equation. Indeed, even at the Supreme Court, unanimity is not uncommon: of the seventy-five full opinions published in the 2007 term of the Supreme Court, nearly one-third of them had no dissenting opinion.<sup>375</sup>

If judges are *already* unconstrained by precedent, then the parade of horrors that will supposedly ensue should *already* be happening. The legal realists' theories acknowledge, implicitly or explicitly, that the fact that legal decisions reflect political preferences does not, *ipso facto*, throw the law into flux because most decisions are not political. Similarly, I acknowledge explicitly that the fact that we should decrease reliance on stare decisis will not, *ipso facto*, throw the law into flux. Moreover, if anything, an obligation to follow precedent creates a tremendous first-mover advantage for the first court to address a given question. For example, it might be the case that the district judge in *Neer* came out against the shareholder plaintiffs because he harbored some animus against shareholders (or whatever). Because other courts have followed *Neer* almost blindly, that initial judge's policy preferences have been enacted across the country. Stare decisis may not limit the role of policy preferences; it may simply change *whose* policy preferences get furthered—the first judge's.

There is one final point I want to make. In his 1999 article, Talley concludes that precedent cannot be explained as an information cascade.<sup>376</sup> First, he writes that cascades are unlikely to occur because of the possibility of appellate review.<sup>377</sup> However, as Guthrie and George point out, the overwhelming majority of cases are affirmed on appeal, suggesting that appellate review is not as robust as Talley

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cases). In a recent article, Frederick Schauer concludes that recent criticism of the Roberts Court for not taking stare decisis seriously is overblown. Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381, 400-01 (2007).

<sup>375</sup> See, e.g., *The Supreme Court—The Statistics*, 122 HARV. L. REV. 516, 521 (2008) (noting that roughly one-third of Supreme Court opinions have no dissent and that Justices dissent relatively rarely). In 2007-2008, only twelve cases were decided by a five-to-four vote. *Id.* at 522.

<sup>376</sup> Talley, *supra* note 82, at 92.

<sup>377</sup> *Id.* at 112-13.

assumes.<sup>378</sup> Second, he argues that cascades are unlikely because we know not only *what* courts did but also *why* they did it, by way of their written opinions.<sup>379</sup> However, as the Sarbanes-Oxley example demonstrates, courts often dispose of a case with little or no written explanation, suggesting that the mere fact of a written opinion is not dispositive in determining if a cascade is at work. Third, Talley suggests that cascades are unlikely because judges are heterogeneous and have competing considerations.<sup>380</sup> However, in this line of argument, Talley underestimates the strong institutional ethos (not to mention the cognitive and behavioral factors) that weigh strongly in favor of following precedent.

But Talley is right in this regard—it is difficult to identify a cascade and it is difficult to identify cognitive bias at work. However, I have tried to identify some factors that could help in making that determination. In conjunction, these factors give us at least more persuasive—even if not conclusive—evidence. For example, in the context of the unconscionability doctrine, Talley says that it is hard to identify a cascade.<sup>381</sup> However, he focuses on only one factor (following the decision of a non-binding court).<sup>382</sup> I have identified other factors. These are not infallible or exhaustive. They do, however, move us closer to knowing when bias is at work.

It is true that appellate review might halt or reverse a district court cascade. But if the Supreme Court hears very few cases (it does), and if the courts of appeal affirm the overwhelming majority of cases (they do), then a district court cascade such as the one I identified earlier bodes poorly for defenders of stare decisis.

## V. CONCLUSION: A WAY OUT

For a very long time—varying a bit by whom you ask—the practice of stare decisis has been the cornerstone of Anglo-American jurisprudence. We are taught that present-day courts should follow the lead of their predecessors because (1) the

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<sup>378</sup> See generally Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the "Affirmance Effect" on United States Courts of Appeals*, 32 FLA. ST. UNIV. L. REV. 357 (2005).

<sup>379</sup> Talley, *supra* note 82, at 107.

<sup>380</sup> *Id.* at 110-11.

<sup>381</sup> *Id.* at 115-18.

<sup>382</sup> *Id.* at 116-17.

earlier courts are more likely to have reached the correct answer; (2) sticking with the status quo rule fosters stability, predictability, and efficiency; and (3) the practice furthers judicial legitimacy.

Yet as scores of studies from a variety of disciplines show, we are not rational actors coldly picking the best solution to a given legal problem. We take mental shortcuts and deviate from rationality in ways we aren't even aware. We are primed to prefer existing social and political systems, and we place an undue weight on tradition and the status quo. If we see others making a given decision, we tend to follow that decision, believing that others know best even when our "private stock of reason" tells us otherwise. In short, our decisions are biased and the biases are correlated.

If our biases were random, we might take some comfort knowing that they might all cancel out. But they are not random. We are cognitively primed to subconsciously prefer precedent—and then, instead of correcting that bias, we built a legal system that *requires* courts to follow precedent. We would do well to look at this practice with a critical eye.

Hanson and Yosifon write that, in developing legal theory, we ought to begin with descriptions of real human actors and work from there.<sup>383</sup> Similarly, the law would be more honest, more accurate—and, yes, more just—if we cast that same critical eye on judicial decision-making.

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<sup>383</sup> Hanson & Yosifon, *The Situation*, *supra* note 20, at 183.